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CONVEYANCER'S NOTEBOOK

TRUST FOR SALE OR TRUST TO RETAIN OR SELL

A correspondent has written inquiring what the practical differences are between a trust for sale and a trust to retain or sell. There is little doubt that since 1925, as a result of the Law of Property Act, 1925, s. 25 (4), draftsmen have shown a preference for the former. The subsection provides that where an instrument coming into operation after 1925 contains a trust either to retain or sell land it is to be construed as a trust to sell the land with power to postpone the sale. The result is, that in the case of land there can no longer be a trust to retain or sell and as very often, in the case of land held on trust for sale, there is not the slightest intention of selling, the distinction is often forgotten. Where there is a trust for sale the primary obligation is to sell and, if the trustees cannot agree whether to sell or not, the property must be sold (*Re Mayo* [1943] Ch. 302). Where property other than land is settled either *inter vivos* or by will this is usually quite contrary to the settlor's or testator's wishes; if there is a substantial holding in a family concern showing a high yield he would generally wish this holding to be passed on to the ultimate beneficiaries.

Again, there is a continuing obligation on the trustees to decide whether to postpone sale or not and they may find themselves liable for breach of trust for failing to carry out this obligation (*Re Roth* (1896) 74 L.T.R. 50; *Re Rudd* [1952] 1 T.L.R. 44, 49). Although it is true that trustees must, in the case of a trust to retain or sell, exercise their discretion bona fide, the burden of deciding whether to sell or not would not in practice be as heavy as in the case of a trust for sale (*cf. Re Inman* [1915] 1 Ch. 187). Further, where there is a trust to retain or sell, the rule in *Howe* v. *Dartmouth* is excluded in its entirety and no question of apportionment between capital and income arises (*Brown* v. *Gellatly* (1867) 2 Ch.App. 751).

It is conceived that in most cases a trust to retain or sell is more likely to be in conformity with the client's wishes than a trust for sale and, owing to the Law of Property Act, 1925, s. 25 (4), there is no need to distinguish in the instrument between land and pure personalty.

Local Inquiries before Contract

We referred, *ante*, p. 97, to the difficulty one of our readers had in obtaining answers from a local authority to additional inquiries other than those in the printed form. The same correspondent writes to say that the Town Clerk of the Southend-on-Sea Borough Council refused to answer the same additional inquiries, except one. The Town Clerk wrote to our correspondent: "As you know the whole point of agreeing the form of inquiries with the Association of Local Authorities was to limit such inquiries to those covered by the form, and if additional inquiries are put forward and dealt with the whole point of the agreement is lost." It is quite clear from the passages from the Report of the Committee on Local Land Charges quoted by us (*ubi supra*) that the Town Clerk's argument is quite incorrect and the attitude adopted by him is contrary to that of the vast majority of clerks to local authorities and to the views of the Committee.

We entirely agree with our correspondent that the profession should support the demand that local authorities should not restrict themselves to answering the questions in the printed form and should be pressed to answer reasonable additional inquiries, especially as it is rumoured that there is to be an increase from 5s. to 10s. for answering inquiries.

Stamp Duty on Conveyances of Land Compulsorily Acquired

The Board of Inland Revenue announce a change of practice in the stamping of conveyances where land is acquired under compulsory powers and the payment made by the purchasing authority includes compensation for damage by severance or other injury to other lands of the vendor held therewith and not taken. It has for many years been the practice, in charging *ad valorem* stamp duty in such cases, to exclude so much of the total payment as is expressed in the conveyance to represent such compensation. The Board have, however, recently been advised that this practice was based on an incorrect view of the law, and that, where (as normally happens) the compensation for severance or other injury represents part of the price or compensation payable for the land, stamp duty is payable on the total figure. The practice is being altered immediately so as to accord with this advice.

In order to obviate any question as to the sufficiency of the stamp on documents which were stamped in the past in accordance with the practice then prevailing, they will, if presented for adjudication under section 12 of the Stamp Act, 1891, be stamped as "adjudged duly stamped."

Practice on First Registration of Land

A revised practice leaflet for solicitors, No. 5, on the first registration of land has just been published by H.M. Stationery Office (price 2d.). We draw attention to the following note appearing in the leaflet:—

D. Registration of Leases of Registered Land

A lease (or sub-lease) for a term exceeding 21 years granted by a proprietor of registered land is a disposition within the meaning of section 18 of the Land Registration Act, 1925, and is completed by registration (as distinct from mere entry of notice) under the provisions of section 19 (2). The fact that the land is situate in a non-compulsory area does not appear to have any bearing upon the question of the need for registration when the reversioner's title is registered. Such leases are regarded as being outside the scope of section 123 (*i.e.*, the provision in that section that an application to register the land shall be made within two months of the date of the grant does not apply where the superior estate is already registered even though it may be in a compulsory area). Therefore such leases can in common with other dispositions by the registered proprietor be registered at any time and no difficulty would arise on a subsequent application for registration merely because the lease was not registered at the time it was granted.

One other point of practice, which is not mentioned in the leaflet, may be noted: it is not necessary to send a certified copy of the conveyance or transfer inducing first registration unless the applicant wishes to have the original back.

Law Society's Conditions of Sale

The 1953 edition of the Law Society's Conditions of Sale has just been published. There has been a complete overhaul and the principal changes are indicated in an explanatory leaflet which should be considered carefully before the new conditions are used. The conditions, form of contract and leaflet can be obtained from the Solicitors' Law Stationery Society Ltd., or from a provincial law society. An article dealing with the changes will be published in our next issue.

LEASEHOLD PROPERTY ACT AND LONG LEASES (SCOTLAND) ACT EXTENSION ACT, 1953

By J. Muir Watt, m.a., Barrister-at-Law

The object of the Leasehold Property Act and Long Leases (Scotland) Act Extension Act, 1953, a somewhat cumbersome title, is to extend the temporary leasehold legislation which was passed in 1951. So far as England and Wales were concerned, this was the Leasehold Property (Temporary Provisions) Act, 1951. A somewhat similar Act was passed for Scotland, the Long Leases (Temporary Provisions) (Scotland) Act, 1951. It is not proposed in this article to deal with Scotland at all, and what follows refers only to the position in England and Wales. Northern Ireland is not affected by the legislation.

The new Act (hereinafter called " the 1953 Act ") received the Royal Assent on May 6, 1953, and came into force on the same day. Its main effect is simply to extend the period of two years, during which the 1951 Act was to be effective and which was due to expire on June 23, 1953, until December 24, 1954. In other words, the occupation of long leaseholders affected by Part I of the 1951 Act, is now safeguarded until December 24, 1954, and the period during which shop tenants protected by Part II of the 1951 Act can make applications for renewal of their tenancies is extended until December 24, 1954. This is simple enough, but it is worth while to take note of the present position in regard to leasehold legislation, and to look at one or two points in the drafting of the Act which may not be absolutely clear at first sight.

The 1951 Act was described by the then Attorney-General, Sir Hartley Shawcross, as merely a first-aid or standstill measure, designed to provide a kind of moratorium in regard to the most urgent problems which arise in this field, in order that the Government might have time to prepare permanent legislation. The Government of which Sir Hartley Shawcross was a member expressed confidence that it would be able to secure the passing of permanent legislation for leasehold reform, covering both the problem of long leases of residential property and improved security of tenure for business premises, before June 23, 1953. The present Government has not been able to do this, but it has published an outline of its permanent proposals in the White Paper entitled " Government Policy on Leasehold Property in England and Wales " (Cmd. 8713).

The Home Secretary, Sir David Maxwell Fyfe, in introducing in the House of Commons the Second Reading of the Bill for the 1953 Act, pointed out that the Bill which embodied the proposals for permanent legislation would inevitably be complicated, technical and difficult. He therefore made no apology for not being ready yet to present it. In the meantime it was necessary to extend the operation of the 1951 Act beyond June 23, 1953. It will be seen that the present Government expects the permanent legislation to be on the Statute Book before Christmas, 1954. In fact the Government hopes that such legislation will be passed by the summer or early autumn of 1954. This means that the Bill for it must be introduced before Christmas, 1953. We may, accordingly, look forward to studying the details of the Government's proposals for permanent leasehold legislation in the form of a Bill towards the end of the present year.

There is only one section in the 1953 Act which applies to England and Wales, and one section applying to Scotland. The third and last section is the Short Title.

There is no difficulty about section 1 (1). It merely substitutes for the period of two years from the commencement of the 1951 Act (June 24, 1951) a period beginning with the commencement of the 1951 Act and ending with December 24, 1954. As a corollary, it substitutes for references to the expiration of two years from the commencement of the 1951 Act references to the expiration of the period ending with December 24, 1954. The 1951 Act is now to be read with these substitutions.

Section 1 (2) requires a little more explanation, particularly in view of the misunderstandings about it which were revealed in the course of the Parliamentary debates on the Bill. It provides that in the application of section 5 of the 1951 Act to tenancies which expire on or after June 24, 1953 (*i.e.*, the tenancies which are protected as a result of the passing of the 1953 Act) section 5 (4) of the 1951 Act (which provides for the stay of proceedings) shall have effect with the following substitutions:—

(a) the substitution of January 21, 1953, for November 21, 1950; and

(b) the substitution of references to the commencement of the 1953 Act for the *first three* (not the fourth) references to the commencement of the 1951 Act.

The effect of these two substitutions will be dealt with separately.

Section 5 (4) of the 1951 Act provided for a stay of proceedings in respect of forfeiture and re-entry and a suspension of an order for damages, when proceedings had been brought after November 21, 1950 (the date of publication of the Bill for the 1951 Act) and before

the commencement of the Act (June 24, 1951). It is important to observe that section 1 (2) (a) of the 1953 Act does not in any way affect these proceedings. They remain stayed. All that section 1 (2) (a) does is to introduce a similar stay, in respect of tenancies which would have expired on or after June 24, 1953 (*i.e.*, the newly protected tenancies), where proceedings have been brought after January 21, 1953 (the Bill for the 1953 Act was presented on January 22) and before the commencement of that Act (May 6, 1953). It may be asked why this provision was necessary, since the effect of section 1 (1) of the 1953 Act is to apply section 5 (1) of the 1951 Act, which prevents the landlord from bringing actions for forfeiture or damages during a period which is now extended to December 24, 1954. The answer is to be found in the need to exclude the ordinary rule of construction that when the law is altered during the pendency of an action the rights of the parties are to be decided according to the old law. It is true that once the 1953 Act was passed tenancies expiring within the period ending December 24, 1954, were protected, but a landlord might have started an action before the 1953 Act was passed, in respect of a tenancy which fell outside the 1951 Act because it was due to expire by effluxion of time after June 23, 1953. In the absence of section 1 (2) (a) of the 1953 Act, such a landlord would have had a vested right which he could have prosecuted by continuing the action, notwithstanding the change in the law during the pendency of the action.

The next point is the substitution, by section 1 (2) (b) of references to the commencement of the 1953 Act for the *first three* references in section 5 (4) of the 1951 Act to the commencement of that Act. There are in fact *four* references in section 5 (4) of the 1951 Act to the commencement of that Act. Why is the substitution not made in the case of the fourth reference? The reason is that the first three references are simply references to "the commencement of this Act," which have to be translated into references to "the commencement of the 1953 Act," but the fourth reference is to "the expiration of two years after the commencement of this Act." This expression is already given the required translation by section 1 (1) (b) of the 1953 Act, which substitutes references to the expiration of the extended period for references to the expiration of two years from the commencement of the 1951 Act.

The purpose of section 1 (3) of the 1953 Act is to deal with a difficulty which might otherwise arise in connection with applications under Part II of the 1951 Act (as extended) for the renewal of shop tenancies which were due to come to an end, by notice to quit given

by the landlord after June 23, 1953 (*a*). As a result of section 11 (1) (b) of the 1951 Act the application must be made not later than one month after the giving of the notice to quit by the landlord. A shop tenant might, however, have received a notice to quit a month or more before the 1953 Act was passed, the notice being one which did not expire until after June 23, 1953. Such a shop tenant was outside the 1951 Act, owing to the date of expiry of the notice to quit. He could not, therefore, do anything before the 1953 Act became law. By that time, however, if section 1 (3) of the 1953 Act had not been enacted, he would have been out of time. He would not have been able to make his application within a month of the giving of the notice to quit. Section 1 (3) gets over this difficulty by allowing him to make his application not later than a month after the commencement of the 1953 Act (May 6, 1953).

Section 1 (4) requires a brief word of explanation. One of the conditions of the protection given to the "holding-over" cases covered by section 2 of the 1951 Act was that, if the holding over was by virtue of a tenancy, express or implied (as distinct from a wrongful holding over, which was itself protected in certain cases), such tenancy must have been due to expire or have been capable of being terminated by notice to quit earlier than two years from the commencement of the 1951 Act. This condition is preserved by section 1 (4) of the 1953 Act, which provides that in this case there is no substitution of the extended period. Tenancies which, by fulfilling the condition, benefited by the protection given by the 1951 Act will, of course, receive the extended protection given by the 1953 Act. The condition, in other words, is now historical only. It was a necessary condition of certain tenancies receiving the protection given by section 2 of the 1951 Act, and such tenancies have the protection automatically continued until December 24, 1954. If, however, section 1 (4) of the 1953 Act had not been enacted, the effect would have been to confer retrospectively the protection given by section 2 of the 1951 Act on certain tenancies which were not within section 2 when it was enacted. The effect, that is to say, would have been to tamper with one of the conditions of eligibility for the protection given by section 2 of the 1951 Act, thus affecting the scope of the protection retrospectively, whereas all that is wanted is to continue the protection already given. Section 1 (4) puts this matter right.

Finally, it should be noted that the passing of the 1953 Act has necessitated the making of new Regulations under section 11 (2) of the 1951 Act as extended, prescribing the form and contents

(*a*) S. 1 (3) (b) says "on or after" June 23, 1953, but tenancies coming to an end "on" June 23 were within the 1951 Act: see s. 10 (1) of that Act. The "on or," of course, does no harm.

of the notice which a landlord can give to a tenant requiring him to elect within a month of the service of the notice whether or not to make an application under Part II of the Act for the renewal of his shop tenancy. The new regulations, which are the same as the old apart from the necessary references to the 1953 Act, are the Leasehold Property (Temporary Provisions) (Shops) Regulations, 1953 (S.I. 1953, No. 783). They supersede the Leasehold Property (Temporary Provisions) (Shops) Regulations, 1951 (S.I. 1951, No. 1215) which are revoked. The new regulations were made on May 6, and came into operation on May 11, 1953.

THE TOWN AND COUNTRY PLANNING ACT, 1953

By J. F. Garner, ll.m., Solicitor

After what has seemed a rather long delay, and which has been to some extent irritating to conveyancers, Royal Assent was given to the first instalment of H.M. Government's " reshuffle " of the planning legislation, and the 1953 Act became law on May 20, 1953 —this date of itself, however, will have little significance in future, as most of the substantive provisions of the new Act relate back to November 18, 1952, the date when the White Paper was published.

Abolition of development charge

First, section 1 provides that Part VII of the 1947 Act " shall not apply and shall be deemed never to have applied to operations begun on or after November 18, 1952, or to uses of land instituted on or after that date." By way of expansion of this dispensation, it is also provided that if a determination of the development charge payable was made so as to cover a specified period only for a particular use, the continuance of that use after the end of that period is to be deemed to be the institution of a new use, and so will not attract any fresh liability to development charge (section 1 (3)). Similarly, where a planning permission (pre- or post-1948) has been granted for a limited period only, expiring on or after November 18, 1952, the retention of buildings or works covered by such permission on the expiration of that period will not attract liability to development charge (section 1 (4)). If a charge has actually been paid in respect of some development which is exempt under the Act, this will be repayable (section 1 (5))—the cases where this will occur will obviously be few, and no provision is made for any general repayment of development charge. Presumably, where a charge *is* repayable under section 1 (5), the cash will be refunded to the person who actually made the payment, regardless of any intermediate dealing with the land concerned; no specific procedure is laid down for the making of claims for repayment, nor is any time limit fixed.

The word " operations " used in section 1 is clearly to be understood (though it is not expressly so provided) in the sense in which it is used in section 69 of the 1947 Act, and so the effect is to abolish

development charge completely after November 18 last. This, however, is without prejudice to operations begun or uses instituted before that date, and where a development charge has been determined or application for a determination has been made before that date then all the operations and uses covered by the determination or application are to be deemed to have been begun or instituted when the *first* operation or use was so begun or instituted (section 1 (2)). In some cases, no doubt there will be argument whether or not particular operations were begun before or after the material date, and the decision, on the somewhat similar wording of section 78 of the 1947 Act, in *L.C.C.* v. *Marks & Spencer, Ltd.* [1953] 1 All E.R. 1095, may here prove of assistance. From the point of view of title, it will be important to establish on which side of the material date a particular operation or new use falls; if before the date, it will still be necessary for subsequent purchasers to ensure that the charge has been paid or secured to the satisfaction of the Central Land Board, or that their "consent to proceed" has been obtained, before the development was commenced.

Provisions consequential on the abolition of development charge (in section 3) amend sections 22 (1), proviso, and 51 (4) of the 1947 Act, to the effect that those clauses will remain in force as if section 1 of the new Act had not been passed, and development charges had been payable accordingly. Section 3 (3) makes provision for compensation claims on the revocation or modification of planning permission.

Claims on the global sum

The second substantive provision in the Act is section 2, which deals with payments from the "global sum" for the depreciation of the value of land as a consequence of the passing of the 1947 Act, under Part VI thereof. Payments under section 58 are now not to be made, but claims duly made (and in due time) for such payments are to be satisfied in accordance with a further Act hereafter to be passed. There are then a number of detailed provisions dealing with assignments of Part VI claims, designed to implement the White Paper policy of H.M. Government that the right to these claims should be vested in the owner of the legal interest in the land to which they refer; the Central Land Board are now expressly directed (see section 2 (3)) to use their powers of approving particular assignments to secure that end.

The position of such assignments is as follows:

(1) In three cases, *notice* of the assignment only need be given to the Central Land Board not later than June 20, 1953, or within

one month of the making of the assignment, but if notice had already been given before the Act was passed (see Claims for Depreciation of Land Values Regulations, 1948, S.I., 1948, No. 711, art. 7), no further notice need now be given. These cases are :

(a) if the assignment operates only to transfer the beneficial interest in a claim in respect of a particular interest in land to the person beneficially entitled thereto, or to some interest in which that interest merges by virtue of the same transaction; or

(b) if the assignment does not operate to transfer any beneficial interest in the claim; or

(c) if the assignment was made or granted before November 18, 1952.

(2) In other cases of assignments made on or after November 18, 1952, any assignment will be void (" shall be of no effect ") unless and until it has been approved in writing by the Central Land Board. Such approvals will, therefore, become documents of title in appropriate cases, and wherever the property sold includes an admitted claim, the vendor should be able to establish, and the purchaser should inquire as to, the position of the claim with reference to the material date in November, 1952. As mentioned above, the Central Land Board are compelled to follow the expressed policy in giving or withholding their approval to particular assignments.

Useful precedents of assignments will be found in Potter & MacIntyre's *Planning Precedents* (at pp. 85 and 127), and the Law Society (see *Law Society's Gazette* for May, 1953, at p. 195) have recently agreed some forms in consultation with the Central Land Board (see also C.L.B. leaflet " Assignments 1 " issued in June, 1953). It should be emphasised, however, that although these claims are now seen to have a value at one time quite unexpected, the new Act does *not* reopen the door to claims, and the new machinery for assignments can apply only to those claims that were duly made and within the original time limit, now long expired.

Other matters

By section 3, a few " loose ends " are tied up. Thus—

(a) the Central Land Board may not in future exercise their powers of acquisition of land under section 43 of the 1947 Act, unless they had entered into an agreement or served notice to treat prior to November 18, 1952 (section 8 (4)).

(b) Pending further legislation, the Mineral Development Charge Set-Off Regulations, 1951 and section 6 of the

Mineral Workings Act, 1951 (so far as ironstone is concerned), are to continue to have effect as if section 1 of the 1953 Act had not been passed (section 3 (5)).

(c) Regulation 6 of the Town and Country Planning (Modification of Mines Act) Regulations, 1948, is not to apply to any determination of compensation or consideration made after May 20, 1953 (section 3 (6)).

(d) Pending further legislation, no application may be made for the variation of a mining lease under section 30 of the Mineral Workings Act, 1951, nor will any order be made under that section on any application made before the passing of the new Act (section 3 (7)).

RENT TRIBUNAL DECISIONS AND APPEALS

By T. J. Sophian, Barrister-at-Law

Neither the Furnished Houses (Rent Control) Act, 1946, nor the Landlord and Tenant (Rent Control) Act, 1949, give litigants any right of appeal. Under the 1946 Act the tribunal is empowered to determine the reasonable rent of premises let as a residence, provided that the rent includes payment for the use of furniture or services. On the other hand the 1949 Act confers powers on tribunals to determine the standard rent of certain rent-restricted premises, principally of those which have been erected or reconstructed after September 1, 1939.

Control by High Court

Although no right of appeal is given, the High Court exercises control over such tribunals. The principal method by which this control can be exercised is by applying to the High Court for an order of certiorari for the purpose of bringing up the decision of the tribunal so that it may be quashed. It does not appear easy, however, to determine the extent to which control can be exercised by the High Court over these tribunals where they have not exceeded the jurisdiction but have nevertheless arrived at a decision which is contrary to law, or where they have acted without any evidence at all. Decided cases appear to make some distinction for this purpose. Where the order of the tribunal appears to be one given within its jurisdiction, and on the face of the order no error is apparent, then a court, it seems, will not intervene; but on the other hand, where the order is what is termed a " speaking order " and indicates the grounds or reasons for the decision, then, if an error in law is apparent on the face of the order, the court can intervene and quash the order. (*R.* v. *Northumberland Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338.) It is very important therefore, from a landlord's point of view, as well as indeed from a tenant's, that a tribunal in a doubtful and difficult case should be asked to give its reasons for its decision so that, if the tribunal has erred, opportunity will be afforded to the aggrieved party to have the decision brought before the Divisional Court and quashed.

Prohibition and Mandamus

Reference should be made in passing to two other orders, that is the order of mandamus and the order of prohibition. Mandamus will lie where the tribunal refuses to exercise a jurisdiction which it enjoys. Thus, if a tribunal refuses to entertain an application because it considers that the premises were not let as a residence when in fact they were, then the aggrieved party could apply to the court and ask for an order of mandamus directed to the tribunal to hear the application. Conversely, if the tribunal purports to exercise a jurisdiction which it does not enjoy, then the aggrieved party can apply to the court for an order of prohibition directed to the tribunal forbidding it from entertaining the application. Thus, for example, if a room in what is in fact a boarding house is " let " so that there is no tenancy whatsoever, the occupier being merely a licensee, a tribunal would have no jurisdiction to entertain the application and prohibition would be directed to it.

As regards prohibition, reference may be made (among other cases) to the case of *R.* v. *Paddington Rent Tribunal, ex p. Bell, London and Provincial Properties, Ltd.* [1949] 1 K.B. 666. There the local authority had made it a rule, of its own apparently, to refer all the tenancies of a block of flats to the tribunal where two or more reductions of rents had been made in respect of that block. In that case the local authority acting on this rule had of its own accord referred 555 cases to the tribunal without any sufficient inquiry into the matter and notwithstanding that the tenants had made no complaint. It was held that this was not a bona fide exercise of its powers by the local authority and that the tribunal had no jurisdiction to entertain an application of this sort and prohibition accordingly was directed to the tribunal.

It will be apparent that, where the remedy is prohibition or mandamus, extrinsic evidence by affidavit will be admissible before the Divisional Court, and such affidavit evidence will indicate the facts or matters relied on as showing lack of jurisdiction. Such affidavit evidence as to extrinsic matters may also to some extent be admissible on applications for certiorari but only when the order of the tribunal is in the nature of a speaking order.

Decisions

Jurisdiction

It may be convenient to refer to some of the more important decisions given by the Divisional Court. In *R.* v. *Paddington Rent Tribunal, ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R. 448 the court stated that where the order of a tribunal was good on its face

and within its jurisdiction, the court would not interfere although the tribunal may have misconstrued the Act or even though they had rejected evidence or come to a decision without evidence.

In *R.* v. *Hampstead Rent Tribunal, ex p. Ascot Lodge, Ltd.* [1947] K.B. 973, the court held that before a tribunal could have jurisdiction under the 1946 Act it was necessary that the rent should be inclusive of payment for the use of furniture or services, and for this purpose it was necessary that there should have been a contract entered into between the landlord and the tenant for supplying furniture or services; if there was no such contract, then the tribunal would have no jurisdiction, even though the tenant enjoyed the use of furniture or services in fact provided voluntarily by the landlord. Furthermore, this case decided that a tribunal was not entitled to consider breaches of contract by the landlord; it had to fix the rent on the assumption that the tenant was receiving all to which he was entitled under the agreement made with the landlord. If the landlord was not supplying the furniture and services agreed to the tribunal was not entitled to reduce the rent on that ground : a tenant's remedy in such a case was to have recourse to the ordinary courts and claim damages for the breach.

In *R.* v. *Paddington Rent Tribunal, ex p. Bedrock Investment Co., Ltd.* [1948] 2 K.B. 413, the question of the conflict between the Rent Restrictions Acts and the Act of 1946 arose for consideration. It was pointed out in that case that for this purpose three types of letting had to be considered. First, there was the case where the letting included no furniture or attendance. In such circumstances the rent would not be inclusive of payments for the use of furniture or services, and accordingly the tribunal would have no jurisdiction. In the second type, a substantial portion of the rent would be fairly attributable to the use of furniture and to attendance. That clearly would be a case within the Act of 1946. But the third type of case was one in which the Rent Restrictions Acts themselves might apply. In that case the letting would be one in which part of the rent was attributable to the use of furniture or attendance but the amount of the furniture or attendance was small. In the third type of case if the premises were within the Rent Restrictions Acts as they would appear to be, then the tribunal, in determining the rent to be paid, could not fix a rent which was lower than the amount of the standard rent or the amount of the rent which was recoverable under the Rent Restrictions Acts. Thus the court stated in that case: "If the tribunal found a house the standard rent of which is £X and it is let for £X plus £Y, £Y representing the use of furniture and services, the tribunal could deal with the £Y as they liked so long as the total was not reduced below £X."

In *R.* v. *Blackpool Rent Tribunal, ex p. Ashton* [1948] 2 K.B. 277 the court pointed out that, where the furniture or services supplied by the landlord was so small that it could not be truly said that the rent was inclusive of payments for furniture and services, the tribunal was not entitled to strain the matter as it were and thus bring the case within its jurisdiction. In that case what the landlord had supplied was a clock and some curtains, a gas cooker and an Ascot water heater. The court held that the case fell outside the Act and the tribunal had no jurisdiction.

Going behind the Contract

In *R.* v. *Hackney Rent Tribunal, ex p. Keats* [1950] 2 K.B. 15n. the tenancy agreement provided that the premises should be used only for the purpose of tailoring so that the premises were let, not as a residence, but for the purpose of a trade. The tribunal, however, considered that the clause was a sham and that they were entitled to hear the reference. The court, however, held as far as the tribunal was concerned, the nature of the letting had to be determined by the document which the parties had signed. The tribunal was not entitled to rectify the document even though they might consider that it did not record the true agreement between the parties. In such a case it was for the parties to go before the ordinary courts to have the documents rectified, and then, after rectification, it might be open to them to go back to the tribunal. This case was explained and distinguished in a later case, *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1, where it was held that the tribunal was entitled to inquire into the facts to decide whether or not it had jurisdiction and therefore it had power to consider the bona fides of the agreement signed by the tenant. In this case unfurnished premises were orally let at 35s. per week on condition that the tenant hired his furniture to the landlord for one year at £12 per annum and executed a document certifying (inter alia) that the letting was a furnished letting at 35s. per week. The tenant signed the document and entered into possession. The tenant later applied for a reduction and the tribunal accepted the evidence of the tenant that the letting originally was of unfurnished premises, and came to the conclusion that the signed document did not constitute a valid agreement and did not modify or replace the earlier oral agreement and that the premises were not bona fide let furnished. The tribunal thus assumed jurisdiction and reduced the rent to 15s. per week. On an application by the landlord for certiorari it was held that the tribunal was entitled to inquire into the facts in order to decide whether it had jurisdiction or not and therefore it had power to

consider the bona fides of the agreement signed by the tenant. In his judgment Lord Goddard said, at p. 6: " The law to be gathered, especially from *R.* v. *Income Tax Special Commissioners* (1888) 21 Q.B.D. 313 and *R.* v. *Lincolnshire JJ., ex p. Brett* [1926] 2 K.B. 192, is that if a certain state of facts has to exist before an inferior tribunal has jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the correctness of the decision." And referring to *Ex p. Keats, supra*, Lord Goddard added that that case went too far, if it laid down, as it appeared to do, that in no circumstances could a tribunal inquire into the genuineness of an agreement.

Determination of Collateral Matters

In *R.* v. *City of London Rent Tribunal, ex p. Honig* [1951] 1 K.B. 641, the tribunal had to determine a collateral fact, namely, whether a notice to quit given by the landlord had expired before the date of the reference and whether accordingly there was any tenancy in existence at all, for the purpose of determining whether it had jurisdiction. It was held that the tribunal was entitled and indeed bound to consider collateral facts, the determination of which would decide whether it had any jurisdiction; but where a tribunal had decided such collateral facts and it came to a wrong decision, as for example that the notice to quit was bad or otherwise, the Divisional Court could review their determination and in a proper case quash their decision.

In *R.* v. *Sidmouth Rent Tribunal, ex p. Sellek* [1951] 1 K.B. 778, a house outside London of a rateable value of £70 was converted into four self-contained flats in July, 1947, and one was let at £200 per annum. In March, 1948, the flats were rated separately, the flat in question being assessed at £80, the assessment being subsequently reduced to £64. No application was made to the county court to apportion the rateable value of the house or to determine that of the flat. The tenant applied to the tribunal to determine the reasonable rent for the flat, stating that the rateable value was £64. This figure was unchallenged and the tribunal reduced the rent. On the application of the landlord for certiorari it was held that, in the absence of an apportionment of the rateable value of the whole house by the county court under section 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the only rateable value of the flat which could properly have been placed before the tribunal was that at which it was first assessed, *viz.*, £80, and, as that assessment was in excess of the limits laid down

by section 3 (1) (*c*) of the Rent Restrictions Act, 1933, the flat was outside the Rent Acts and the tribunal had no jurisdiction to determine the application.

Onus of Proof

It is to be pointed out, however, that the onus of satisfying the court that the tribunal has come to a wrong decision on any such collateral facts will rest on the person challenging the tribunal's decision. In *Honig's Case*, *supra*, the court held that the landlord, who was the applicant, had not discharged that onus.

Procedure

On the question of procedure, rent tribunals, although they exercise quasi-judicial functions, have a procedure of their own, which is very dissimilar from the procedure of an ordinary court of law. They can act on their own knowledge; witnesses need not be called before them, but if they are called, they must allow them to be cross-examined; they may act, not on evidence, but on statements made to them, provided of course, such statements are not proved to be inaccurate.

Thus, in *R.* v. *Brighton, etc., Rent Tribunal, ex p. Marine Parade Estates, Ltd.* [1950] 2 K.B. 410, statements were made by counsel on behalf of the tenants at the hearing before the tribunal. These statements were accepted as accurate and no evidence was called. The landlord called witnesses who were not cross-examined; figures were submitted on behalf of the landlords showing that the existing rents did not produce any profits but these figures were not examined apparently by the tribunal. The tribunal made reductions in the rent and the Divisional Court refused to interfere. In his judgment in that case, Lord Goddard pointed out: "The procedure which I have indicated can work only if the tribunal can act in that way and on their own inspection, if they like to make an inspection, of the premises, or on any information which they themselves may have. If witnesses are tendered, I have no doubt that it is the duty of the tribunal to hear them. If they are tendered and cross-examination is desired, it is the duty of the tribunal to allow that cross-examination. Then, if the other side wish to call evidence to answer it, it is, again, their duty to allow it. But, I repeat, it is quite obvious that these tribunals can act without having any evidence before them at all; neither party need appear; neither party need file any statement in writing unless he likes; a tenant can merely ask the tribunal to fix a proper rent; if he does, the landlord can appear, stay away, submit any statement, or, of course, call any evidence he likes. How, therefore, can it be said that the tribunal in this case

have offended against the rules of justice which this statute and these regulations made under it have established? That these proceedings have not been conducted in a way which would be tolerated in an ordinary court of law there is no doubt; but the ordinary courts of law are not governed by statutes like this of 1949, which permits these tribunals to act on their own knowledge and without any evidence."

The regulations made by the Minister under the Act have no power to impose any formal conditions, which must be observed in order that an application to the tribunal should be competent. Thus, the fact that a subtenant stated that his sublessor was the "landlord," when in fact, the name of the superior landlord should have been given in the application as the landlord, was held not to make the application ineffective: *Francis Jackson Developments, Ltd.* v. *Hall* [1951] 2 K.B. 488.

Withdrawal of Application

Furthermore it has been held that the applicant may at any time before the tribunal's decision, and, it is submitted, notwithstanding that the tribunal has entered upon consideration of the reference, withdraw his application and, in the case of such withdrawal, the tribunal has no power to give any determination: *R.* v. *Hampstead and St. Pancras Rent Tribunal, ex p. Goodman* [1951] 1 K.B. 541; and see *R.* v. *Fulham Rent Tribunal, ex p. Roberts, The Times*, April 23, 1953.

Notices to Quit

On the question of notices to quit, section 11 of the 1949 Act extended the rights with regard to security of tenure which were originally conferred on a tenant by section 5 of the 1946 Act. But, as the courts have pointed out, the two Acts are to be construed as one, and the extended power given by section 11 cannot be exercised, unless the notice to quit, by reason of the time of service or otherwise is one which would be protected by section 5 of the 1946 Act itself. Thus, neither section 5 of the 1946 Act nor section 11 of the 1949 Act would be of any avail if the notice to quit was served before the making of the application to the tribunal, nor if it was served after the expiry of three months from the date of the decision of the tribunal, no further reference of the contract having been made in the meantime.

In *R.* v. *St. Helens and Area Rent Tribunal, ex p. Pickavance* [1952] W.N. 98; [1952] 2 K.B. 370, a tenant had referred his contract of tenancy of a furnished house to a rent tribunal and on September 8, 1950, the tribunal gave a decision approving the rent

and giving no direction as to security of tenure. On December 9, 1950 (three months and one day afterwards) the landlord gave the tenant notice to quit expiring on December 18. On the same day as the service of the notice the tenant applied to the tribunal (under section 11 (1) of the 1949 Act) for an extension of his period of tenure and on January 19, 1951, the tribunal made an order extending the period and subsequently made further orders granting extensions.

It was held that, as section 11 (2) (*b*) of the 1949 Act was required by section 11 (5) to be construed as one with the 1946 Act, the section operated only on notices to quit covered by section 5 of the 1946 Act, *i.e.*, those served at any time before the decision of the tribunal was given or within three months thereafter and that therefore the notice to quit having been served more than three months after the tribunal's decision, the tribunal had no power to grant an extension of the tenancy under section 11 (2) (*b*).

Conversely, in *R.* v. *Folkestone and Area Rent Tribunal, ex p. Sharkey* [1952] 1 K.B. 54, on May 4, 1951, a weekly tenant was given notice to quit expiring on May 13, 1951. On May 10 the tenant applied to the rent tribunal for a reduction of rent and an extension of the period within which the notice to quit should not take effect. The tribunal reduced the rent, but refused to entertain the application as to security of tenure. On a motion by the tenant for an order of mandamus it was held that section 11 (1) of the 1949 Act did not give the tribunal power to hear an application by the tenant to extend the period within which a notice to quit should not take effect where the notice to quit had been served by the landlord on the tenant before the tenant referred the tenancy to the tribunal. Incidentally it should be observed that, although in *Francis Jackson Developments Ltd.* v. *Hall* [1951] 2 K.B. 488 the court assumed that the tribunal had jurisdiction although notice to quit had been given before the application, the point that it had no jurisdiction on this particular ground was not taken as it was in the *Sharkey* and *Pickavance Cases*. *Francis Jackson Developments Ltd.* v. *Hall* must be rejected on this particular point.

It should be noted that the *Pickavance Case* has been taken to the House of Lords on appeal.

Decisions In Rem of Tribunals

As to the nature of decisions of rent tribunals, the courts have held that they operate in rem and not in personam, so that a rent determined by the tribunal becomes attached to the property, irrespective of subsequent changes in the ownership of the reversion or of tenant.

Thus, in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, ex p. Marks* [1951] 2 K.B. 194, on September 1, 1939, a dwelling-house was let unfurnished at a weekly rent of £3 3s., which was therefore the standard rent under the Rent Restrictions Act. In July, 1950, the landlord let the premises furnished with certain services, at a weekly rent of £2 15s. The tenant applied to a rent tribunal which reduced the rent to £1 5s. On an application by the landlord for an order of certiorari to quash this decision of the tribunal, it was held that both the standard rent and the rent fixed by a tribunal and registered under the Furnished Houses (Rent Control) Act, 1946, ss. 2 (2) and 3 (2) attached to the premises in rem; and that by fixing a rent below the standard rent, the tribunal was doing something which " affected " the provisions of the Rent Restrictions Acts which was contrary to the provisions of section 7 of the Act of 1946, even though the premises were let furnished at the time of the application.

Again, in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, ex p. Gormly* [1952] 1 K.B. 179, the rent of a furnished house had been fixed on August 25, 1949, at £4 per week and registered by the local authority under the Act of 1946. On July 16, 1951, on the application of a new tenant the rent was further reduced although there was no proof of any change of circumstance. It was held that the rent of £4 per week was payable in respect of the premises and not merely as between the particular parties before the tribunal, and that the rent therefore was to remain until the expiration of such period, if any, as might have been fixed by the tribunal or until it was altered by the tribunal on a subsequent application by reason of changed circumstances. In the present case since there had been no change of circumstances, the tribunal had no jurisdiction to entertain the tenant's application and the rent of £4 per week accordingly stood unaltered.

Change of Circumstances

Where there is a change of circumstance, only that circumstance may be taken into account and the tribunal cannot roam at large over the whole ground covered by the previous application, and take advantage of the new circumstances for the purpose of reviewing its previous decision. Thus, where a new tenant referred a tenancy in respect of which a rent had previously been fixed by the tribunal, and the only change was that there had been an increase in rates and outgoings, burdens which were usually borne by the landlord and not the tenant, it was held that the tribunal was not entitled to review the whole of the facts on which its previous determination had been founded and reduce the rent originally fixed. It could

consider the rent only in the light of the new circumstances which in this case would have justified an increase in the rent if there were to be any alteration at all: *R.* v. *Fulham, etc., Rent Tribunal, ex p. Hierowski* [1953] 2 W.L.R. 1028.

Premiums

The charging of a premium is prohibited by section 2 (1) of the 1949 Act, and on the question of what constitutes a premium for this purpose reference may be made to *R.* v. *Birmingham (West) Rent Tribunal, ex p. Edgbaston Investment Trust, Ltd.* [1951] 2 K.B. 54. There an agreement was made between the landlord, 18 prospective tenants and a firm of builders that six dwelling-houses should be converted into 18 flats for the sum of £18,000, of which £9,000 was to be paid by the landlord and £500 by each of the tenants, and that on completion a lease of 14 years should be granted at a rent of between £100 and £175 per annum. On application by three of the tenants, the tribunal decided that each sum of £500 was a premium required by the landlords " as a condition of the grant of a tenancy " contrary to section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and the tribunal certified that Part I of Sch. 1 applied and determined the rental in each case to be £8 18s. 6d. per quarter. On an application by the landlord for an order of certiorari it was held that to constitute a premium within the Act of 1949 there must be a payment to the landlord and not to a third person. In this case accordingly no premium had been required by the landlord and the certificate and determination of the rent tribunal were quashed.

ACCUMULATIONS OF INCOME

By G. Boughen Graham, ll.b., Barrister-at-Law

Introductory

It is well known that Peter Thellusson, a merchant of Huguenot origin, died in 1794, and by his will directed that after payment of about £100,000 to his wife and family the rest of his estate consisting of realty worth about £5,000 per annum and personalty amounting to about £600,000 should be accumulated during the lives of all his sons, grandsons and grandsons' children living at his death. It will be observed that the period was 21 years short of the maximum period allowed by the modern rule against perpetuities but it is thought that the validity of the extra 21 years was not then established beyond doubt and the draftsman played safe. At the dropping of the last life the estate was to be divided into three parts and settled upon the testator's three senior male descendants in tail. Great controversy was engendered and many estimates were made of the amount which might be in the estate at the time of distribution. Like modern newspaper reports of the costs of a *cause célèbre* the estimates could never be criticised on the grounds of conservatism and figures from 100 to 150 million pounds were mentioned. In fact an eminent actuary calculated at the time that the trust might last until about 1868 and that if it did the total might be about 23 million pounds.

The will was contested but upheld in the House of Lords in *Thellusson* v. *Woodford* (1805) 11 Ves. 112. In the event the accumulations continued until the death of the last grandchild in 1856 and after further litigation (reported in (1876) 33 L.T. 379) the estate was finally divided between two descendants of the testator. Far from there being over 100 million pounds it was found that by mismanagement and excessive litigation there was but a modest amount left. Indeed it seems that between 1806 (the year after the will was upheld) and 1833, when there was a private Act giving certain powers to the trustees, legal costs alone amounted to some £89,000. The testator himself anticipated that his will might not find favour, for in it he said : " As I have earned the fortune which I now possess with industry and honesty, I trust and hope that the legislature will not in any manner alter my will or the limitations there created, but permit my property to go in the manner in which I hereby dispose of it."

In those days retrospective legislation was not the fashion, as it now tends to be, and when the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), was passed it applied only to future dispositions. It was amended by the Accumulations Act, 1892, and, slightly amended, the two Acts are to be found re-enacted in the Law of Property Act, 1925, ss. 164, 165 and 166. Of these section 164 (1) provides for the limitation of accumulations to four alternative periods whilst section 166 further restricts these in the case of accumulations for the purpose of purchasing land. Section 165 provides for extension of the periods in some cases and section 164 (2) exempts certain provisions entirely from the ambit of the restrictions.

It may be thought that in these straitened days there will be little desire to accumulate the income of estates—indeed, the tendency is to the reverse—but, in fact, the provisions are of first rate importance today, largely as a result of the skirmishing that takes place between Crown and taxpayer. Strange as it may seem the provisions are one of the staffs and props of the Revenue authorities and he who accidentally transgresses them may pay dearly for his error.

In this article it is proposed to consider first those accumulations which are invalid quite apart from the provisions of sections 164 to 166, next the exemptions from those provisions and then, when it has been seen exactly what is affected by them, the alternative periods available and to draw attention to one or two dangers which may be encountered.

Restrictions Independent of the Law of Property Act, 1925, ss. 164 to 166

Repugnancy

If there is an immediate and vested gift to a donee, but there is attached to it a provision that possession and enjoyment are to be postponed in order that the income may be accumulated and handed over with the capital, such a provision is void as being repugnant to the interest already granted. In other words, however long or short is the period of accumulation directed, the court will not enforce it where no person other than the donee is interested: see *Wharton* v. *Masterman* [1895] A.C. 187. Since such a direction is invalid on general principles sections 164 to 166 can have no application. But before this doctrine can be brought into play it is essential that there should in fact be no one at all interested in the accumulations other than the donee. If there is anyone else with an interest, however remote, the accumulations

will be enforced to the extent permitted by sections 164 to 166. In *Berry* v. *Geen* [1938] A.C. 275, the testator had directed the payment of certain legacies and annuities out of residue and provided that the income not required to satisfy the annuities should be accumulated until the death of the last annuitant and subject thereto he gave all his residuary estate to a church. The testator died in 1925 and so, by section 164, the accumulations were bound to come to an end in 1946 even though there might still be one or more annuitants living. The church authorities contended, so far as is relevant to this matter, that, once the annuities were secured, the *Wharton* v. *Masterman*, *supra*, principle applied: they were entitled to the whole of what was not needed to satisfy the annuities and so it should be handed to them. But it was held that if, in 1946, the trust were still in existence, the accumulations would cease and someone or other must be entitled to the income: on a true construction of the will it was held that it passed on intestacy and so the accumulations had to be continued until 1946 in order to satisfy the contingent interests of the next-of-kin.

Another such case was *Re Deloitte* [1926] Ch. 56, where the testatrix left an annuity to a niece and, subject thereto, directed accumulation during the life of the niece and left the fund and accumulations for such of the niece's children as should attain 21 years. When the accumulations were brought to a premature end by sections 164 to 166 the niece was aged 65 and there were six children all of full age. If the class of children was in fact closed then they could claim the income; it was held that the class was not closed since, for the purpose of determining legal rights as distinct from purposes of administration, a woman could never be presumed to be past childbearing so that there was a possibility of the class being enlarged. As a result the surplus income fell into residue. It may, however, be noted that in *Berry* v. *Geen*, *supra*, Maugham L.C. reserved his opinion as to the correctness or otherwise of this decision.

A direction for accumulation which is void within the *Wharton* v. *Masterman* principle can be ended by the donee whether an individual or a charity. But just as it might perhaps be said that the individual was under some moral obligation to pay attention to the donor's wishes so, if it becomes necessary to settle a scheme, the court will bear in mind the donor's desires.

Remoteness

Sections 162 to 166, in effect, catch only those provisions which are good within the modern rule against perpetuities—the genesis of the original Accumulations Act was the feeling that that period

is too long for an accumulation trust. If the provision in fact transgresses the perpetuity period then it is *ipso facto* void and there is no room left for the application of sections 164 to 166. This is important for two reasons :—

First, because, if the direction transgresses the perpetuity period the exceptions contained in section 166 (2) cannot be prayed in aid as such, so that a direction to accumulate to raise portions which infringes that period is bad notwithstanding that it is untouched by section 164. There is, it seems, one exception to this doctrine : quite independently of section 164 (2), a trust to accumulate for the payment of debts is valid even though it exceeds the perpetuity period : see *Lord Southampton* v. *Marquis of Hertford* (1813) 2 Ves. & B. 54 and *Bateman* v. *Hotchkin* (1851) 10 Beav. 426.

Secondly, because, as will be seen, where a direction for accumulation is struck at by sections 164 to 166 the effect is to curtail it to the appropriate statutory period, that is to say, only the excess is void : see *Griffiths* v. *Vere* (1803) 9 Ves. 127, *Logdon* v. *Simpson* (1806) 12 Ves. 295, and many other cases; but if the direction infringes the perpetuity period it is wholly void : see *Curtis* v. *Lukin* (1842) 5 Beav. 147.

Thus if, in a settlement *inter vivos*, there is a direction to accumulate during the life of the settlor and 22 years thereafter it is wholly void, if it is for the life of the settlor and 20 years thereafter it is good for the lifetime. Similarly, in a will a direction to accumulate for 22 years is wholly bad but a direction to accumulate for the lives of the testator's grandchildren alive at his death and 21 years after is good for 21 years from the death.

Exceptions from Sections 164 to 166

Debts

The sections do not apply to any provision for payment of the debts of any grantor, settlor, testator or other person. It is not necessary that there be existing debts and a trust to discharge contingent or future debts is, in general, within the exception. Thus in *Re Mason* [1891] 3 Ch. 467, it was held that accumulation to meet liabilities to repair and reinstate building was good, although it was said, at p. 472 : " If at the end of the 21 years during which accumulation is permitted by the Thellusson Act [Accumulations Act, 1800] it were found that the property was completely insured and all the covenants in the leases completely performed it would seem to be that the court would not hold that further accumulation was a due execution of the trusts and powers

if it were simply directed to . . . some possible future liability which could not be reasonably expected to ripen into an actual debt." So also in *Re Cox* [1900] W.N. 89, a provision to accumulate to set up a reserve fund against future losses in the testator's business was held to be not within the exception. If and when the debts are discharged the provision ceases to be one for the payment of debts: see *Re Baroness Llanover* [1907] 1 Ch. 635, 648.

It is not necessarily fatal if there is added to a direction to accumulate to pay debts a direction towards some further purpose: such added direction will not invalidate the former direction if the former is the primary provision: which is the primary provision is a matter for construction in each case: see *Re Hurlbatt* [1910] 2 Ch. 553; but when the debts have been discharged the principle of *Re Baroness Llanover*, *supra*, will apply and the subsidiary purpose, if it is to be valid, must stand on its own feet. A provision which is aimed, not at the payment of debts, but at recouping from income capital which has already been used in their payment is not within the exception; in such cases the debts have already been paid: see *Re Heathcote* [1904] 1 Ch. 826.

Portions

The sections do not apply to any provision for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor or testator; or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations, or to whom any interest is thereby limited.

Perhaps the most important matter to be noticed is that the word "portion" both in its common meaning and in its technical meaning denotes a part and not the whole. The matter is admirably dealt with by Lord Cranworth, in *Edwards* v. *Tuck* (1853) 3 De G.M. & G. 40, when he said: "A direction to accumulate all a person's property to be handed over to some child or children when they attain 21 can never be said to be an accumulation for raising portions for the child or children: it is not raising a portion at all it is giving everything. . . . If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated."

The latest case on the matter is *Re Bourne* [1946] 1 All E.R. 411. The trusts were of a complicated nature and it is not

necessary to set them out. Broadly speaking, the funds were settled for the benefit of seven grandchildren and, subject to certain annuities to them which were to commence in each case at the age of 18 years, it was provided that the income should be accumulated in a separate fund out of which fund the trustees might, at their discretion, give each grandchild £500 when he or she attained the age of 21 years. It was held that this was not within the exception as it was not so much a provision for raising portions as a provision for raising a fund which might or might not be used to provide portions. The Court of Appeal took the view that a provision was only within the exception if it was mandatory on the trustees to use the funds for raising portions and it was not sufficient if it was left to their discretion whether to do so or not. Lord Greene M.R. compares the exception under discussion with that relating to the payment of debts and says, at p. 415: "If counsel for the beneficiaries is right, it would, apparently, follow that a provision which might or might not be used for the payment of such debts at the discretion of some third person, a trustee or someone else, would fall within the exception. As the debts mentioned are the debts of any person . . . it would apparently be possible on that basis, to direct for a long period a valid accumulation, which might or might not be applied for the payment of debts of some heavily indebted stranger . . . that surely cannot be right. . . . Similarly, it seems to me that a provision for 'raising portions' means a provision which . . . must be applied to that purpose."

It is only necessary to add that to be within class (b) above it is only necessary that some interest was limited to the parent or ancestor and not that he should have actually taken it, that is to say, it is immaterial that it determined. Further, the interest need not be in the particular property which is to be subject to the accumulation trust.

Produce of Timber and Wood

The sections do not extend to any direction respecting the accumulation of the produce of timber or wood. It is singular that, this provision having been on the statute book for more than a century and a half, there is no reported decision upon it. It has been suggested that the exception may well have been made with the deliberate intention of encouraging the planting of timber for the supply of the Navy, etc. On the other hand it is thought that most estate owners consider and always have considered the produce of timber not as annual income but as a resource for some particular occasion. This view gets some support from Lord

Caernarvon's remark as reported by Pepys: "Timber is an excrescence of the earth provided by God for the payment of debts."

Provisions which are Affected

Express Trusts for Accumulation

Section 164 (1) provides:—

"No person may by any instrument or otherwise settle or dispose of any property in such a manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period. . . ."

It is quite clear and need not be further stated that an express trust for accumulation is within this wording and indeed is not only what the statute is aimed at but is also what it fairly and squarely hits.

Implied Trusts for Accumulation

It is now well settled that an implied trust to accumulate is equally caught by the section. Thus in *Shaw* v. *Rhodes* (1836) 1 Myl. & Cr. 135, Bosanquet J. said: "If the provision in question cannot be carried into execution without postponing the beneficial enjoyment of the rents and profits, in order that these rents and profits may be laid up from year to year, and applied at a future time to a particular object, it appears to be that such a provision is within the statute. If the disposition be such that accumulation is thereby required, it is within the statute. But whether the disposition does or does not require accumulation is a question of construction. . . ." In *Tench* v. *Cheese* (1856) 6 De G.M. & G. 453, Lord Cranworth said: "If a testator directs that to be done which as a necessary consequence leads to an indefinite accumulation he must within the meaning of the statute be taken to have directed accumulation."

An excellent example of an implied trust to accumulate is to be found in the recent case of *Re Robb* [1953] 2 W.L.R. 819. There a testator directed the payment of annuities to his wife and daughter and, as a matter of construction, it was held that these gave to the annuitants a continuing charge upon income. He directed his trustees to hold the residue, after the death of the wife and daughter, in trust for all his grandchildren who attained the age of 25 years within the perpetuity period and *empowered* his trustees to accumulate the surplus income. It was held that this accumulation must cease after 21 years and this conclusion was reached on two separate grounds: we are at present concerned with the second. At p. 823 Danckwerts J. said: ". . . as the annuitants in the present case are given the benefit of a continuing

charge on the income of the testator's residuary estate, they are entitled to have the arrears of the annuities in any particular year, should the income be insufficient, made up out of the income of previous or past years; and, consequently, that would necessarily involve an accumulation, . . . of the income of the residuary estate until finally the fund was released by the death of the last of the annuitants."

Powers to Accumulate

So much for a trust, express or implied, to accumulate. What is the position of a mere power to accumulate? It is submitted that it is, in fact, highly uncertain. Before discussion, it would be well to set out a hypothetical example of a mere power to accumulate because, strangely enough, it does not appear that one has ever been before the courts. Let us therefore consider a case where the settlor has settled property upon such of his grandchildren, already born, who shall be alive and shall have attained 21 years on a specified date which is well within the perpetuity period, and has provided that until that date the income shall be payable to X which is a company with perpetual succession (so that there is no complication that X may die before the date of distribution). He then provides that his trustees may from time to time, if they in their absolute and uncontrolled discretion think fit, withhold any part of the income from X and hold it to devolve with the capital. The question is whether this is within the section.

In *Re Robb*, *supra*, Danckwerts J. said at p. 822: "Mr. Bathurst contends that a power to accumulate need not necessarily be carried out; and that in any event it is not a direction to accumulate; and that therefore section 164 . . . does not apply. I am unable to accept that argument. There is not only a reference towards the end of subsection (1) to directions for accumulation, but that subsection begins: 'No person may by any instrument or otherwise settle or dispose of any property in such a manner that the income thereof shall . . . be wholly or partially accumulated for any longer period' than those specified. It seems to me, therefore, that whilst a power to accumulate unlimited in form need not necessarily be bad in itself it could not be exercised lawfully by the persons to whom such a power has been given, in the present case the trustees, so as to accumulate for a longer period than 21 years from the death of the testator; and that any other result would be contrary to the prohibition which is contained in the opening words of subsection (1) of section 164."

Now it must be said at once that this is nothing more than an *obiter dictum* because, as shown above, Danckwerts J. went on

to show without question that what was before him was not a pure power at all but was an implied trust. Nevertheless it must be held in the greatest respect because it is clear that the learned judge had heard argument on the footing that it was a pure power and this seems, strange as it may appear, to be the only considered judicial pronouncement on the point. There has, in fact, been considerable dispute about the matter of late in Lincoln's Inn and such places and it is worth looking at it more closely. Danckwerts J.'s observations indicate that it would be convenient to consider separately whether the original power is bad and whether, if it be good, any particular exercise of it by the donee is bad.

Hargreaves in his *Treatise on the Thellusson Act* (1842), pp. 77–8, suggests that: "The prohibitory words in the first section are general enough to include those cases; being aimed at dispositions whereby income shall be accumulated, not at dispositions wherein income shall be directed to be accumulated. Consequently, upon the principle already laid down, every disposition, which in substance and effect causes accumulation is, upon principle, within the Act." But here he is really talking of implied trusts. Where there is a mere power it cannot be said that the original disposition causes the accumulation, what causes the accumulation is the active exercise by the trustees of their discretion. The original disposition merely establishes a set of circumstances in which accumulation may or may not occur. If a highway authority constructs a road of such a type that motorists may drive thereon at excessive speeds and, if a motorist does so and thereby damages himself and his vehicle, has the highway authority caused the damage?

The opening words of section 164 (1) refer to dispositions under which the income *shall* be accumulated, and it is submitted that "shall" is imperative and that there is no good reason to strike it out and substitute the word "may." Unless "shall" is to be read as "may" a mere power to accumulate, as such, is not caught by the words of section 164 (1). That conclusion is reinforced when one compares the construction which has been put on section 166. That section is further considered below and it is concerned with accumulations to be devoted entirely to the purchase of land. The prohibition is in exactly the same form and terms as is section 164. Now where there are two sections of the same Act concerned with the same subject-matter and having identical wording it is thought that they must have the same meaning. If a provision under which the trustees may or may not accumulate at their discretion is within section 164 then surely a provision under which the trustees may or may not apply the

entire fund to the purchase of land is within section 166. In fact the construction that has always been put upon section 166 (see *Re Dawson* [1895] W.N. 102 and *Re Knapp* [1929] 1 Ch. 344) is that if the accumulations are available for other purposes so that they only *may* be used for the purchase of land they are not within the section.

It has also been suggested that even if a mere power is not within the opening words of section 164 (1) it is caught by the later words "In every case where any accumulation is directed otherwise than as aforesaid. . . ." Again the question must turn upon the natural meaning of words. If I have said that income is to be paid to X but that the trustees may if they think fit withhold it, have I "directed" them to withhold it? One would not have thought so.

Danckwerts J. in *Re Robb* made the most interesting suggestion that, even if the original power were good, the exercise of it out of the appropriate period might be bad. The opening words of section 164 (1) read: "No person may by any instrument or otherwise . . . dispose of any income in such manner that the income thereof," etc. Can it be said that the trustees, when exercising their discretion to withhold the income from X are "persons otherwise disposing of property in such manner that its income shall be accumulated"? The suggestion is an attractive one but it is suggested that they are not. When the trustees decide that a particular amount of income shall be withdrawn from X and allowed to devolve with the capital, how are they disposing of it so that its income shall be accumulated? They are disposing of it so that its income will in due course be paid to X—unless, indeed, they again and quite independently and anew exercise their discretion with regard to the income that may arise upon it. All they are doing is disposing of property so that its income may possibly be the subject of a further exercise of discretion. That is a long way from making sure that it "shall" be accumulated.

It is rather suspected that if and when a pure power to accumulate comes before the court there will be a strong tendency to try to hold it to be within the Act but it is also suggested that, if the wording be examined, there is good reason to think that it is not so caught. Hence the position must be regarded as doubtful. It might be said that the whole policy of the Accumulations Act and its successors has been to prevent the dead hand taking property out of the use of the living: how can this be said to be the case when the matter is in no way decided by the dead but is in the hands of living trustees?

The Periods Available

Section 164 (1) prescribes four periods and, before considering them in turn, it may be noticed that in fact one only of the four may be applied in any given case.

The Life of the Grantor or Settlor

It is sometimes not realised that in the case of a settlement made *inter vivos* and directing accumulations to begin forthwith this or the fourth period are the only ones which are available. In *Wolstenholme and Cherry*, 12th ed., Vol. 1, p. 521, is to be found the innocent-sounding remark : " It has been suggested that the following new paragraph should be inserted : ' (e) Where the trust is created by an instrument *inter vivos*, coming into operation either before or after the commencement of this Act, a term of 21 years from the date of that instrument '." It is to be feared, however, that such a suggestion will never be adopted so long as the Treasury remains a power in the land. The task of those whose pleasure it is to protect their clients against the unwelcome attentions of the tax-gatherer would be too greatly eased thereby.

We must, however, take the law as it is and, if the fourth period cannot be brought into play and if the accumulations are to start forthwith, then all that is available is the lifetime of the settlor.

Twenty-one Years from the Death of the Grantor or Settlor

This is the period which is generally most appropriate in the case of wills, although there is nothing to prevent a settlement *inter vivos* providing for an accumulation to start on the death of the settlor and to continue for 21 years thereafter. But one hastens to add that in most cases any such provision would be highly eccentric in that it would ensure that the whole of the settled funds passed under the Finance Act, 1894, s. 1, on the death of the settlor—which is precisely what a very large number of settlements are designed to avoid. The period of 21 years starts from the day after the death and expires on the 21st anniversary. Thus, if there is a trust to commence accumulation five years after the death of the settlor or on the death of an annuitant, it will be good only until the 21st anniversary no matter when it may have actually commenced : *cf. Re Bradwell* [1952] Ch. 575, *infra*.

The Apportionment Act, 1870, will be applied at the end of the period, although it was urged that it should not do so as its application would to some extent increase the amount of income that might be accumulated : see *St. Aubyn* v. *St. Aubyn* (1861) 1 Dr. & Sm. 611.

Duration of Minorities of Persons Living at the Death of the Grantor

The third period is the duration of the minority or respective minorities of any person or persons living or *en ventre sa mère* at the death of the grantor, settlor or testator. This period is one which commences on the death of the testator or settlor and it is in many ways similar to the second period. Except for the case of an infant *en ventre sa mère* at the death of the settlor or testator it must always be less than that allowed under the second head. That the period does commence with the death was emphasised in *Jagger* v. *Jagger* (1884) 25 Ch.D. 729, at p. 733 (*per* Kay L.J.). "But it is clear that this part of the Act refers only to a direction to accumulate when such accumulation is to begin from the date of the grantor's death; and to say that the accumulation may begin at the date of the settlement, whilst the grantor is living, and continue during his lifetime and afterwards during the minorities of the children, is in effect to contend that the Act is cumulative—that is to say that you may take one of these periods and apply it after a previous one has been exhausted."

The persons whose minority determines the limitation must be alive or *en ventre sa mère* at the death but, although such a provision might be rather strange, for it might result in a totally unnecessary charge to estate duty, it is not in the least necessary that the lives chosen have any interest in the funds.

Duration of Minorities of Persons Entitled to the Income

The fourth period is the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated. It is at once both wider and narrower than the third period. It is narrower in that the lives chosen must be those who would be entitled to the income if of full age: but it is wider in that those persons need not be alive or *en ventre sa mère* at the death but may be born thereafter and in that the period need not begin at the death of the settlor. Thus in *Cattell* v. *Cattell* [1914] 1 Ch. 177, a testator, who died in 1880, vested property in trust for his grandchildren, directing that income should be accumulated during the minority or minorities of any of them. A child Gladys was born to the testator's son in 1885 and the question arose whether income could validly be accumulated until her majority in 1906. It was held that it could be so accumulated and Lord Parker said at p. 188: "In my opinion the fourth alternative period covers not only children who are born or *en ventre sa mère*

at the death of the settlor but children who are subsequently born. . . ." It follows that under this provision income may, if events turn out favourably, be accumulated during successive minorities so that the total period of accumulation may be a long one. But the minorities chosen must be those of persons who are prospectively entitled to the income to be accumulated and in practice it will not be easy to abuse the provision.

Qualifications in Two Special Cases

Infant Becoming Entitled

Where an infant becomes entitled to income then, unless there is a statutory provision to the contrary, such as is to be found in the Law of Property Act, 1925, s. 21, it is necessary to accumulate the income for his or her benefit because he or she cannot give a valid receipt for it. Again it is provided in the Trustee Act, 1925, s. 31, that income not required for maintenance shall be accumulated. With this in mind it is expressly provided by section 165 that where accumulations of this sort are necessary under the general law or by statute they shall not be added to the period directed by the will or settlement and the validity of the two considered together. Thus when, as in *Re Maber* [1928] Ch. 88, in the events which happen, it is found that at the end of the appropriate statutory period the funds are held in trust for an infant, the accumulations rendered necessary by that fact are not affected or invalidated by the Act.

Accumulation for Purchase of Land

Section 166 reproduces the Accumulations Act, 1892, and provides, in identical wording to that of section 164 that, if the accumulations are for the purchase of land only, then the period available is restricted to the fourth—the minority or minorities of persons entitled. By subsection (2) it is provided, in effect to confirm *Re Dawson* [1895] W.N. 102, that the section does not apply to accumulations which are to be held as capital money under the Settled Land Act, 1925, whether or not the accumulations are primarily liable to be laid out as land. This provision, it is thought, reinforces the effect of the word "only" in the principal subsection. Capital moneys under the Settled Land Act may be applied in many ways (see section 73) and, as stated above, the better opinion is that this provision is only intended to apply where the accumulations must be laid out in the purchase of land.

Settlements by Companies

There appears to be neither authority nor textbook discussion as to what period is available for a trust to accumulate where the settlor is a company with perpetual succession. It is clear, of course, that the trust must not extend beyond the perpetuity period proper or it will be void *ab initio* but apart from this limitation the position is obscure. If there are infants who would, if of full age, be entitled to the income directed to be accumulated then the fourth period will be available. The second and third periods can hardly be applied for it seems a far-fetched interpretation to equate the "death of the settlor" with the dissolution of the company. It is an open question whether it is any less an abuse of words to equate "the life of the settlor" with the continued existence of the company. Hence the position is that if there are no minorities within the meaning of the fourth period then the company can validly direct accumulations either for the whole perpetuity period if it shall continue in existence so long or, alternatively, not at all. Which would be adopted if the matter fell to be decided seems quite uncertain.

It may be the question has been neglected because it is not often that a company does, or for that matter has power to, settle its property upon trust to accumulate the income thereof. But there is no reason why a company should not take such power and if it were held that the first period were available, the "life" being the continued existence of the company there might be available a convenient way of circumventing the provisions. For this reason it might be that the courts would lean against such a construction. It may be that the matter will sooner or later have to be decided one way or another in view of the strongly worded dictum of Danckwerts J. in *Re Robb*, *supra*, wherein the learned judge considered mere powers to accumulate to be within the statutory provisions. Frequently, when a company founds a pension scheme for its employees the conditions of benefit are such that there are comparatively few, if any, persons eligible in the early years whilst the number increases as time goes on. In these circumstances it may well be that the company will transfer a considerable sum to trustees and those trustees will have the power, if they see fit, to invest the surplus income thereon as an accretion to capital so that the heavier future needs can be met thereout.

If it be the fact, contrary to the contentions expressed above, that a power to accumulate is caught by section 164 then it will be urgently necessary to know whether in such a case the power

is exercisable during the continued existence of the company or not. If not there can be no doubt that such income will result back to the company with, perhaps, undesirable results in the matter of income tax, profits tax, etc.

The Effect of the Act

Upon the Beneficiaries' Interests

Section 164 provides that where an accumulation is directed which is caught by the section then "the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed." It has already been observed that, since this provision applies only so long as direction to accumulate is contrary to the section, only the excess period, which offends against the provision, is void and the result is that the accumulation commences as directed but comes to a premature end. The section only touches the direction for accumulation and does not provide for the acceleration of subsequent interests.

In the ordinary case of a will therefore, where there is a direction to accumulate some fund other than residue then, on the premature stopping of the accumulations, the income falls to the residuary legatees or devisees according to whether the fund be realty or personalty. If the residue is settled then it now appears—although at one time it was doubtful—that the income goes to the life-tenant of residue : see *Re Hawkins* [1916] 2 Ch. 570 and *Re Garside* [1919] 1 Ch. 132. If it is the residue of the estate which is directed to be accumulated then the released income must go as on intestacy.

If the direction to accumulate is in a settlement *inter vivos* then, if the terms of the settlement do not include any limitation which is apt to include such released income in the same manner in which a residuary gift is apt to include it in the case of a will, there is a resulting trust for the settlor and since in such a case the usual permitted period is the life of the settlor this means that it will result to his personal representatives on the trusts affecting his estate.

There is, however, an apparent exception to these rules. If on the true construction of the will or the settlement there is found to be a general charitable intent from the commencement of the trusts then the released income will pass to charity. Thus in *Re Monk* [1927] 2 Ch. 197, Lawrence L.J. said, at p. 215 : "In my opinion the destination of the surplus income after the period

allowed by law for the accumulation of income depends primarily upon whether or not there is to be found in this will a general intention to devote such residue to charity. It is not disputed that if there be such a general charitable intention any surplus income after the expiration of the period allowed by law will be applicable *cy-près* and will not pass to the next-of-kin." A recent application of this principle is to be found in *Re Bradwell* [1952] Ch. 575. There the testator had left a reversionary interest in his residuary estate to trustees upon certain charitable trusts and had directed them, if there were any surplus income, to accumulate it to form a fund to support a resident Wesleyan minister in a specified village. It was held that, although the last trust failed because such accumulations could only be made during the period of 21 years from the testator's death, which period had long previously expired, yet there was a general charitable intention so that the surplus income was applied *cy-près*.

In Revenue Matters

It need hardly be said that any effect which the provisions against accumulation may have upon the amount of tax or duty payable is merely a reflection of the change in beneficial interests referred to above. But those effects can be so unfortunate and sometimes so unexpected that some reference to them might be useful. It is not always realised that a cessation of accumulations on a death or at a time ascertained by reference to a death will always result in the whole fund, both capital and accumulated income, passing under section 1 of the Finance Act, 1894, and bearing estate duty at a rate ascertained after aggregation with the free estate of the deceased. The reason for this is best explained in *Westminster Bank, Ltd.* v. *Att.-Gen.* [1939] Ch. 611. In that case a settlor had settled property upon trust to accumulate for 21 years or during his life whichever should be the shorter period, and thereafter to hold the property in trust to pay the income to such of the children of G, born during the settlor's life, as should attain 21 or being female marry under that age and, on the death of any such child after attaining a vested interest, to hold the capital of that child's share as the child should appoint and, in default of appointment, for the issue of the child. At p. 616 Clauson L.J., reading the judgment of the Court of Appeal, said: "Previously to [the settlor's] (*a*) death the children of G. had an interest in the income of these funds, since they had a right to have that income accumulated so as to provide an

(*a*) The report says "her," *i.e.*, G.'s, death, but this is clearly a mistake.

accumulated fund the fruit of which would come to them, and the children of those children had a corresponding right to have it accumulated so as to provide an accumulated fund the capital of which would, in default of appointment to the contrary, come to them : but a clear change in the beneficial possession of the property as a whole took place on [the settlor's] death. Not only did the life interests of the children of G. become interests in possession, but the interests of the next generation (children of the children of G.) were changed in that the accruing income was no longer to be rolled up for their benefit as an addition to capital, but the right to this income passed to their respective parents for their respective lives. Accordingly, in our judgment, estate duty became payable on [the settlor's] death on these various funds under section 1."

When it is remembered that in the case of a settlement *inter vivos* the only periods available are the first and the fourth, and when it is remembered that it makes no difference whether the accumulation is expressly ended by the settlement, as in that case, or prematurely ended by the statute as in *Re Bourne*, *supra*, it will be realised how great is the danger that estate duty may be payable upon property of which the settlor divested himself of all beneficial interest many more than five years previously. This particular risk is often run (without its being properly realised) because of the well-known provisions of Part XVIII of the Income Tax Act, 1952 (imposing liability to income tax on a settlor in certain cases). A discussion of those provisions is beyond the scope of this article, but it will be recalled that in many cases of settlements by parents upon their children it is considered essential that there should be no chance of any income being paid to the child at all until he or she attains the age of 22 years. In fact this is not really so but it is a widely held opinion which is often acted upon. To achieve this object accumulation is directed until the child attains 22 years. Now if the settlor survives to see his child attain 22 years all is well : if the settlor dies before the child attains 21 then the statutory accumulations under section 31 of the Trustee Act, 1925, as it were, take up the running (see the Law of Property Act, 1925, s. 165, *ante*), and there is no change in the beneficial interests until those statutory accumulations stop when the child attains 21. Since the parent is no longer alive it no longer matters that the child comes into possession of the income before he attains the age of 22 and since the changes in the beneficial interest which occur when he does so do not take place at any time fixed with reference to the settlor's death no estate

duty is payable. But consider what happens if the father is so very unfortunate as to die whilst the child is between 21 and 22 years old. The accumulation was not during the minority of one who would otherwise have been entitled to the income (fourth period) because in terms it was to extend a year beyond that period : hence it is limited to the life of the settlor and so ceases : the child is no longer an infant so no statutory accumulations are effective. Accordingly there is a change in the beneficial interests at the settlor's death and the whole funds are dutiable and aggregable. The same sort of thing happened in *Re Bourne*, *supra*, where it was held that the accumulations were not protected as being to raise portions.

THE CONTRACTUAL CAPACITY OF LIMITED COMPANIES

By Hamish R. Gray, ll.m., Solicitor

When one individual enters into a contract with another, the difficulties which are likely to confront him affecting the other party's capacity to contract are comparatively few, and when in addition the parties meet face to face even the complications incident to the other's infancy or unsoundness of mind may be sensibly diminished. These particular dangers do not affect the person who deals with a limited company, but instead there are other, equally dangerous, pitfalls to be avoided. The basic rules affecting companies' contracts are familiar to all, but a number of recent cases have emphasised the attendant difficulties.

A person dealing with a limited company must assure himself of four things:

(1) that the company in fact exists;
(2) that the company is entitled to carry on business;
(3) that the proposed dealing is *intra vires* the company's memorandum of association; and
(4) that the person acting on behalf of the company has in fact power to do so.

It is proposed to deal with each point in turn.

The existence of the company

Unless the company has been incorporated before the date of the contract, the other party's rights at the best will only be against the individual who purported to deal on the company's behalf. The leading case is *Kelner* v. *Baxter* (*a*), in which Baxter and others purported to buy a consignment of wine from the plaintiff " on behalf of " a company about to be formed to manage a hotel. The company was in fact incorporated some three or four weeks later. It was held, not only that the company was not liable on the contract (even though it had purported to adopt it) but further that the company could not make itself liable for the price of the wine otherwise than by a completely fresh contract with the plaintiff. On the other hand, Baxter and the others were held to be personally liable on the ground that, purporting as they did to act as agents

(*a*) (1866) L.R. 2 C.P. 174.

for a non-existent principal, it was only possible to give effect to the contract by making them liable.

The principle of *Kelner* v. *Baxter* (*supra*) has however been qualified to some extent by the recent decision of the Court of Appeal in *Newborne* v. *Sensolid* (*Great Britain*), *Ltd.* (*b*). In this case the plaintiff was the promoter and intended director of a new company, which had not, however, been incorporated at the material date. The company purported to sell certain goods to the defendants and the contract was signed " Leopold Newborne (London), Ltd. Leopold Newborne." The purchasers made default and Newborne sued them in his own name. It was held that the purported contract was a complete nullity and that Newborne could not adopt nor sue upon it.

Lord Goddard C.J. (with whose judgment Morris and Romer L.JJ. concurred) based his decision on two alternative grounds:

(1) " As the company were not in existence when the contract was signed, there never was a contract and the plaintiff cannot come forward and say ' it was my contract ' " (*c*).

(2) That in any case the plaintiff did not purport to contract expressly as agent. " We cannot find that the plaintiff purported to contract as agent. . . . The only person who has any contract here is the company and Mr. Newborne's signature is merely confirming the company's signature " (*d*).

Ground (1) is not reconcilable with the *ratio decidendi* of *Kelner* v. *Baxter* as expressed by Willes J. in that case (*e*). " Both on principle and upon authority it seems to me that the company never could be liable upon this contract and construing this document *ut res magis valeat quam pereat* we must assume that the parties contemplated that the persons signing it would be personally liable." Lord Goddard appears to distinguish the cases on the ground that in *Kelner* v. *Baxter* the agent for the purported company in fact accepted delivery of the goods. It is submitted that the cases are not so distinguishable, if a case of this kind is to be decided (as were both *Kelner* v. *Baxter* and *Newborne* v. *Sensolid* (*Great Britain*), *Ltd.*) on the footing of the express contract and not on some implied promise to pay for goods delivered. If a contract is void because one party does not exist, it is void for all purposes irrespective of whether the purported company's agent is plaintiff or defendant; and if this is what the Lord Chief Justice meant, the present case and *Kelner* v. *Baxter* cannot both stand. However, Lord Goddard,

(*b*) [1953] 2 W.L.R. 596; [1953] 1 All E.R. 708.
(*c*) *Per* Lord Goddard C.J. [1953] 2 W.L.R. at p. 601; [1953] 1 All E.R. at p. 710.
(*d*) [1953] 2 W.L.R. at p. 601; [1953] 1 All E.R. at p. 710.
(*e*) (1866) L.R. 2 C.P. 174 at p. 185.

by distinguishing the decision in *Kelner* v. *Baxter*, must be taken to have recognised its authority. If this be so, it may be that Lord Goddard's judgment intends to say only, that *Kelner* v. *Baxter* serves to give some effect to a contract when it is the other party who sues the agent for the purported company, and cannot have the converse effect of enabling the agent for the purported company to sue the other contracting party.

Ground (2) is, however, much more serious from a practical point of view because it appears to say that the agent for the purported company cannot be a party to proceedings based on the contract, unless in signing the contract he used some words like " on behalf of " or " as agent for," to indicate that he participated in the transaction and was not merely the machinery through whom the purported company expressed its " will." It is true that in the instant case the purported agent was the plaintiff; but there is nothing in Lord Goddard's words to confine them to the case of a plaintiff. Indeed, as it is on the ground that the plaintiff never intended to contract as agent that Lord Goddard is distinguishing *Kelner* v. *Baxter* (*supra*) his dicta would appear to apply where the agent for the purported company is defendant also. Such a proposition is open to some question; no authority was quoted by the learned judge and in fact it is supported only by the old decision in *Jones* v. *Hope* (*f*) which has hitherto been regarded of somewhat doubtful authority. It is also difficult to reconcile with the cases on personal liability of agents (*g*).

The effect of this decision is, however, that the draftsman of a contract with a limited company, where there is any doubt about the legal existence of the limited company, should by the insertion of appropriate words ensure at least that the individual who signs the contract on behalf of the company will himself be personally liable.

The company's right to commence business

A private company is entitled to commence business immediately upon incorporation (Companies Act, 1948, s. 109 (7)), but, with a few exceptions also to be found in subsection (7), a public company must obtain a certificate from the registrar under this section before it may commence business.

In the case of a public company with a share capital which has issued a prospectus, section 109 (1) applies, and the requirements are as follows:

(*f*) (1880) 3 T.L.R. 247.
(*g*) For example, *Elliott* v. *Bax-Ironside* [1925] 2 K.B. 301; and compare *Fred Drughorn, Ltd.* v. *R/A Transatlantic* [1919] A.C. 203.

(a) the shares payable in cash up to the amount of the minimum subscription must have been applied for and allotted;
(b) the directors must have taken up and paid for in regard to those shares for which they are liable to pay in cash that amount on each share which would be payable by a subscribing member of the public on application and allotment;
(c) no money may be liable to be refunded to applicants for any shares or debentures by reason of a failure to apply for or obtain permission for the shares or debentures to be dealt with on a stock exchange; and
(d) the secretary or a director must file a statutory declaration in the prescribed form declaring that the above conditions have been satisfied.

If no prospectus is issued (a) above does not, of course, apply, but a statement in lieu of prospectus must be filed with the registrar if the company has a share capital, conditions (b) and (c) must be satisfied and a statutory declaration of compliance therewith must be filed as in (d) above. (Subsection (2).)

When the declaration is filed or the declaration and statement in lieu of prospectus, the registrar will issue his certificate under subsection (3) that the company is entitled to commence business. A person dealing with the company is not concerned to see that the detailed requirements of subsection (1) or (2) are satisfied but is bound to accept the registrar's certificate as conclusive evidence thereof. Such a person is, however, concerned to see that such a certificate is obtained, since, unless and until it is issued, contracts made by the company, including preliminary contracts, are provisional only and do not bind the company. The word "provisional" does not mean that until the company is entitled to commence business it may repudiate the contract (as if it were a voidable contract entered into by an infant) but that any such contract should be read as if it contained a term suspending its operation until the registrar's certificate is obtained. It has been suggested (*h*) that it is significant that subsection (4) says "shall not be binding *on the company*" and that by inference such a contract would bind the other party. It is submitted that the better view is that neither party can sue on such a contract unless and until the company becomes entitled to commence business, because until then the suspensive condition has not been satisfied (*i*).

(*h*) *e.g.*, Topham, *Company Law*, 11th ed., p. 61.
(*i*) This applies even to the contract of the signatories of the memorandum to take shares in the company: see *Re Otto Electrical Manufacturing Co.* (1905), *Ltd.*; *Jenkins' Claim* [1906] 2 Ch. 390; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim* [1908] 2 Ch. 515.

The powers of the company

A company incorporated under the Companies Acts enjoys only those powers expressly conferred upon it by its memorandum of association, powers to do anything fairly incidental to the powers so expressly conferred and such additional powers as may be conferred by Act of Parliament. Any purported act of the company which does not fall under one of these three heads is *ultra vires* the company and void.

In the leading case of *Ashbury Railway Carriage and Iron Co. Ltd.* v. *Riche* (*k*) a company whose principal object was the manufacture and sale of railway carriages, wagons and other railway plant entered into a contract in connection with the construction of a railway in Belgium. It was held that on the true construction of the memorandum of association, the building of the railway in Belgium was *ultra vires*; in consequence any contract (including that entered into by the plaintiff with the company) entered into in pursuance of the *ultra vires* actively was itself *ultra vires* and void and further, that even a purported ratification of the contracts by all the members of the company could not cure the defect.

" The memorandum of association defines the limitation of the powers of a company "; and again " I am of opinion that this contract was entirely beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning it was void because the company could not make the contract " (*l*).

It is made clear in the subsequent case of *Cotman* v. *Brougham* (*m*) that this rule is partly for the protection of the public dealing with the company. " The memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects are the greater is the security of those who transact business with the company " (*n*).

Not only is the memorandum there to assist and protect the person dealing with the company, but more, as the memorandum

(*k*) (1875) L.R. 7 H.L. 653.
(*l*) *Per* Lord Cairns, L.R. 7 H.L. at pp. 667 and 672.
(*m*) [1918] A.C. 514.
(*n*) *Per* Lord Parker [1918] A.C. at p. 520.

is a public document open to public inspection, such a person is taken to have read and understood its contents whether or not he has in fact inspected it. "The memorandum and articles of association are . . . open to all who are minded to have any dealings whatsoever with the company and those who so deal . . . must be affected with notice of all that is contained in those two documents" (*o*).

Inspection of the memorandum of association and ascertaining that the proposed contract is *intra vires* may yet be insufficient, if it appears that the other party has notice of *ultra vires* activities of the company. This appears to be the result of the decision of Roxburgh J. in *Re Jon Beauforte (London), Ltd.* (*p*). The business of this company, according to its memorandum of association, was that of "costumiers, gown, robe, dress and mantle makers, tailors, silk mercers, makers and suppliers of clothing, lingerie and trimmings of every kind"—and like purposes. The company decided to carry on the manufacture of veneered panels, which was admittedly *ultra vires*. There was, therefore, no question that contracts for the construction of a factory for this purpose and for the supply of veneering were void, falling as they did fairly within the principle of *Ashbury Railway Carriage Co.* v. *Riche* (*q*). There was also a claim by fuel merchants for the price of fuel supplied to the veneering factory. It was argued on their behalf that as the company required fuel for its legitimate purposes the fuel merchants ought not to be prejudiced by its misapplication. It appeared, however, that the company's correspondence relative to the orders was on headed paper describing the company as "veneered panel manfacturers." The judge held, therefore, that the claimants had "clear notice that the business which the company was carrying on and for which the fuel was required was that of veneered panel manufacturers. The correspondence shows that they had notice of that and, as they had constructive notice of the contents of the memorandum of association, they had notice that the transaction was *ultra vires* the company. Their proof was rightly rejected" (*r*).

It is true that Roxburgh J. reserved the question of what would have happened had the claimants in fact had no notice that their fuel might be applied to *ultra vires* purposes; nevertheless this decision does impose a serious burden on persons dealing with a company, even in contracts which are *ex facie intra vires* the company's powers as laid down by the memorandum. The effect of

(*o*) *Mahony* v. *East Holyford Mining Co., Ltd.* (1875) L.R. 7 H.L. 869 at p. 893, *per* Lord Hatherley.
(*p*) [1953] 2 W.L.R. 465; [1953] 1 All E.R. 634.
(*q*) (1875) L.R. 7 H.L. 653, *supra*.
(*r*) [1953] 1 All E.R. at p. 636.

this case is that even if a person dealing with a limited company has searched and is relying on the memorandum and articles, yet if he has notice that the company is carrying on any *ultra vires* activity, any contract made with the company must itself be regarded as *ultra vires* unless, presumably, the contract in question could only have related to the company's lawful objects (as for example here, a contract for the purchase of artificial silk).

Even so, the judgment leaves a number of difficult questions unanswered. It is not necessary at present to speculate on the limits on the presumption that fuel supplied with notice of an *ultra vires* activity is supplied for that *ultra vires* activity. It is, however, important to know what matters constitute " notice " in this connection.

It appears from the statement of facts in the case in the *Weekly Law Reports* that the claimants had no actual knowledge of the fact that their contracts were *ultra vires* the company, but that it was conceded that they had constructive notice. Constructive notice is generally understood as being notice of those matters which would have come to light had the person affected with notice made those searches and inquiries which a prudent man of business would have made in like circumstances. What searches and inquiries would a prudent man of business make in these circumstances? The decision in the present case suggests not only a search of the Companies Registry but also a visit to the factory to ascertain what in fact was taking place there. If it is not necessary to go so far, ought a person dealing with a company to make *actual* inquiries before contract in order to protect himself?

It would seem that in order to afford such a person complete protection in these circumstances, he should ascertain for himself whether the apparent business of the firm is *intra vires*, since if it is not the contemplated contract will be itself void even though valid when tested by reference to the memorandum of association; perhaps better still, find out (if there can be any question) precisely how the contemplated contract bears on the company's activities.

The authority of the company's representative

Even if the contract is *intra vires* the company's powers as disclosed by the memorandum, it may yet be *ultra vires* the directors or other persons making the contract on the company's behalf, and then the contract will be invalid unless and until it is ratified by the members of the company (*s*).

(*s*) *Grant* v. *United Kingdom Switchback Ry., Ltd.* (1889) 40 Ch.D. 135.

The dicta of Lord Hatherley in *Mahony* v. *East Holyford Mining Co., Ltd.* (*t*) apply equally to the articles of association as to the memorandum, and a person dealing with a company is deemed to have notice not only of the limits of the company's own powers, but also of those of the directors and other officers of the company as defined and delimited by the articles.

The effect is shortly that where the articles stipulate that certain acts of the company must be performed in a particular way, a person dealing with the company is concerned to see that the company's act is in fact performed in this way so far as it affects him. So, for example, if the articles stipulate that cheques must be signed by two directors, a person dealing with the company is bound to see that cheques drawn by the company are in fact so signed—whatever the company may have arranged with the bank.

This rule is qualified by the rule known as "the rule in *Royal British Bank* v. *Turquand*" (*u*) which is to the effect that, provided an instrument or other dealing purporting to be the act of the company conforms with the requirements of the registered documents, a person dealing with the company is not bound to inquire into the details of the internal management of the company to ensure that the dealings are in fact regular as *ex facie* they appear to be. Thus, in the leading case, the directors of a company had power to issue bonds if so authorised by a general resolution of the company. It was held that a person to whom a bond was issued could sue on it whether or not the directors had in fact obtained the stipulated authority. The plaintiff, if acting bona fide, was entitled to assume that the "indoor management" of the company was regular.

This rule, however, is essentially based on estoppel and is similar to the rules of the law of agency affecting "holding out." A person dealing with the company can only pray in aid the decision in *Royal British Bank* v. *Turquand* (*supra*) where the requirements of an estoppel exist—where a director or other servant has, in effect, been held out by the company as having a particular authority, or where the director or other servant has been acting within the scope of his duties as defined by the articles of association and the person dealing with the company has dealt with it in reliance upon this authority or duty. Hence, if a director purports to make a contract on behalf of the company in circumstances in which a director would not normally have power to do so, the company is not liable merely because there is a power in the articles to delegate such functions to a single director, unless the other contracting party was allowed or persuaded by the company to rely on this power of delegation; and

(*t*) *Supra*, n. (*o*).
(*u*) (1856) 6 El. & B. 327.

a fortiori the company would not be liable if the other contracting party had in fact no knowledge of the power to delegate (*a*).

This rule has been illustrated recently by the decision of Slade J. in *Rama Corporation, Ltd.* v. *Proved Tin and General Investments Co., Ltd.* (*b*). In this case the board of the defendant company was empowered by the articles to delegate its powers to one or more of its members. Without the authority of the board, one of the directors purported to enter into an agreement on behalf of the company with the plaintiff company. The plaintiff company had no knowledge of the contents of the articles nor of the board's right to delegate its powers. It was held that as the plaintiff company had no actual knowledge of the power of delegation, it could not rely on such power as conferring any actual or apparent authority on the director who in fact made the agreement, to make such an agreement. Accordingly the defendant company was entitled to deny liability on the contract on the ground of its director's want of authority.

Slade J. in a reserved judgment followed the two cases referred to above (*c*) and emphasised once more that the principle of *Royal British Bank* v. *Turquand* (*supra*) depends on estoppel. He says, "I find . . . that there was no apparent or ostensible authority on which the plaintiff company . . . was entitled to rely. Ostensible or apparent authority must be something emanating from the company and not from the person who seeks to defraud it" (*d*). It follows then that the dicta of Lord Hatherley in *Mahony* v. *East Holyford Mining Co., Ltd.* (*e*) must be read subject to this qualification.

It was indeed argued in the present case that, because a person was deemed to have notice of the contents of the memorandum and articles, he was therefore entitled to rely on them in the same way, even although he had in actual fact no notice of their contents. Slade J. disposes of this as follows: ". . . the doctrine of constructive notice is a purely negative one and not a positive one; and when [we say] that a party is affected with notice [we mean] that if the party fails to inquire he will be imputed with notice; that is to say, it operates in the company's favour. It does not operate in a party's favour so as to enable him to say he relied on something of the existence of which he says he had no knowledge" (*f*).

(*a*) See *Houghton & Co.* v. *Nothard Lowe & Wills* [1927] 1 K.B. 246, C.A. (affd. on other grounds [1928] A.C. 1) and *Kreditbank Cassel* v. *Schenkers, Ltd.* [1927] 1 K.B. 826.

(*b*) [1952] 2 Q.B. 147; [1952] 1 All E.R. 554.

(*c*) *Supra*, n. (*a*).

(*d*) [1952] 2 Q.B. at p. 173.

(*e*) Quoted *supra*, p. 222.

(*f*) [1952] 2 Q.B. at p. 160.

Conclusion

The recent cases all illustrate ways in which a person dealing with a limited company may find himself caught by the unexpected operation of the rules of law affecting the company's contractual capacity. Two points in particular may be made.

First, all the cases emphasise the importance attached to actual knowledge of the contents of the memorandum and articles. It is, no doubt, a counsel of perfection to expect the ordinary practitioner, even in London, to consult the file at the Registry every time he is drafting an instrument affecting a limited company. Yet if he fails to do so, he fails at his peril; he is bound by the registered documents if he fails to search, but he cannot rely upon them in the absence of actual knowledge of their contents.

Secondly, the recent cases illustrate a growing tendency on the part of the Bench towards the strict word-by-word construction of instruments and the narrow interpretation of rules of law affecting companies. In none of the three recent cases discussed above did the defendant's case have any real merits. The principle that the basis of the rule in *Kelner* v. *Baxter* (*g*) was to give maximum efficacy to the contract so far as was possible, was patently disregarded in *Newborne* v. *Sensolid* (*Great Britain*), *Ltd.* (*h*); and the Lord Chief Justice's opening remarks in his judgment (*i*), that "the court dismissed the appeal with reluctance as Parker J.'s judgment in favour of the defendants was based on the merest technicality," underline this. Again in *Re Jon Beauforte* (*England*) *Ltd.* (*k*) a contract *ex facie* valid by reference to the memorandum of association and the subject-matter of the contract was nevertheless held to be void.

Persons dealing with limited companies must bear in mind that they are artificial creations of the law and that as such they have only those powers attributed to them by the law; and any dealings with companies must be brought strictly within these limits, the balance of convenience and commercial practice notwithstanding.

(*g*) (1866) L.R. 2 C.P. 174, *supra*, pp. 217–218.
(*h*) [1953] 2 W.L.R. 596; [1952] 1 All E.R. 708, *supra*, p. 218.
(*i*) According to *The Times* newspaper for February 20, 1953.
(*k*) [1953] 2 W.L.R. 465; [1953] 1 All E.R. 634, *supra*, p. 222.

MAINTENANCE AGREEMENTS AND DIVORCE COURT JURISDICTION

By L. J. Blom-Cooper, ll.b.

Recent decisions on the subject of maintenance agreements (*a*), whilst preventing many difficulties, have in their turn given rise to new problems. Before discussing the implications of these recent decisions, it is as well to understand the position of the law as it now stands.

In *Bennett* v. *Bennett* (*b*) the facts briefly were these: The wife, in the course of proceedings for dissolution of marriage and prior to the pronouncement of a decree *nisi*, entered into an agreement by deed with the husband whereby, in consideration of her not proceeding with the prayer for maintenance, he agreed (inter alia) to make financial provision for her and their son. The husband fell into arrears with his payments and the wife sought to recover the arrears. In dismissing her appeal the Court of Appeal, upholding the decision of Devlin J., who dismissed her action (*c*), reviewed fully the nature of these maintenance agreements, discussion of which will be deferred till later. The state of the law on this subject had gradually developed since the decision of the House of Lords in *Hyman* v. *Hyman* (*d*), where it was decided that such agreements ousted the jurisdiction of the courts under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*e*), and that as such were contrary to public policy (*f*). It was not until 1950 that the problem arose again in the courts. In *Gaisberg* v. *Storr* (*g*) the husband, while divorce proceedings were pending, signed at the office of the wife's solicitors on the latters' notepaper an agreement to pay her £3 per week *alimony* on the wife's undertaking that she would not claim more. The wife subsequently attempted to enforce the agreement, basing her claim on the validity

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(*a*) *Bennett* v. *Bennett* [1952] 1 K.B. 249; *Shott* v. *Shott* [1952] 1 All E.R. 735.

(*b*) [1952] 1 K.B. 249.

(*c*) [1951] 2 K.B. 572.

(*d*) [1929] A.C. 601.

(*e*) Subsequently incorporated into the consolidating Act, the Matrimonial Causes Act, 1950, s. 19.

(*f*) Somervell L.J. in *Bennett* v. *Bennett* at p. 251 noted that "the House [in *Hyman* v. *Hyman*] did not have before it the question whether the existence of this covenant voided the whole deed. . . ."

(*g*) [1950] 1 K.B. 107.

of the agreement as a binding contract. In view of the wife's promise to refrain from applying for maintenance being void, there was no consideration on her side, and her action failed. (In any event, by reason of the use of the word " alimony," it would appear that the undertaking was to exist only for the period between the decree *nisi* and the decree absolute.) In the more recent case of *Combe* v. *Combe* (*h*), an attempt was made by the plaintiff on facts similar to *Gaisberg* v. *Storr*, *supra*, to invoke the principle of estoppel as formulated by Denning J. (as he then was) in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* (*i*). But Denning L.J. in *Combe* v. *Combe* (*k*) explained that the *High Trees* principle was indeed based on estoppel and that it could only be used as a shield and not as a sword (*l*).

In *Bennett* v. *Bennett* (*m*), it was held that the whole or the main consideration on the part of the wife for the payment by her husband of an annuity was her promise not to invoke the court's jurisdiction; it was contrary to public policy and the covenant was illegal. Thus the mere fact that the promise of the wife was made under a deed did not avail her of any rights under it. It would seem that the extent to which the parties can go in making such agreements which will be valid is admirably expressed by Denning L.J. " If the parties," he said (*n*), " do not oust the jurisdiction of the Divorce Court but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid." So long as the agreement is conditional upon the court's sanctioning it, and it subsequently does sanction it, the agreement will be valid, for then the wife's right accorded to her by section 19 of the Matrimonial Causes Act is not ousted. On the other hand, if the agreement denies the wife her access to the courts by her promise not to invoke the rights granted her, then that promise does not bind her and, furthermore, the husband's promise does not bind him.

Quite obviously, when *no* divorce proceedings are pending or contemplated and there is an agreement to separate coupled with an agreement that the husband will pay the wife £x, no question of illegality or voidability arises, for the separation itself is the consideration. However, the question arises whether, where *no* divorce proceedings are pending, the wife can renounce her right to claim

(*h*) [1951] 2 K.B. 215.
(*i*) [1947] K.B. 130.
(*k*) *Supra*, at p. 219.
(*l*) See an article by Lord Justice Denning on " Recent developments in the doctrine of consideration," 15 M.L.R., p. 1.
(*m*) [1952] 1 K.B. 249.
(*n*) At p. 262.

maintenance under section 23 of the Matrimonial Causes Act, 1950, or under the jurisdiction of the magistrates' courts. The question has not arisen directly, but Denning L.J. in *Bennett* v. *Bennett* (*o*) thought she could not do so but was uncertain. In *Tulip* v. *Tulip* (*p*), the Court of Appeal (Lord Asquith and Birkett L.J., Harman J. dissenting) held that the existence of a deed did not preclude the wife from applying to the court under section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 23 of the Matrimonial Causes Act, 1950), and that the court had jurisdiction to determine whether at the time of the application the husband was providing maintenance for the wife which was reasonable in the circumstances. The corollary to this judgment seems to be that, if the court always has the right to adjudicate upon the reasonableness of maintenance either by virtue of the Summary Jurisdiction Acts or section 23 of the Matrimonial Causes Act, 1950, then any agreement by the wife to abstain from invoking this jurisdiction is as much void and illegal as where divorce proceedings are pending (*q*). Any other conclusion would be to stultify the welcome effect of section 23.

Bennett v. *Bennett*, *supra*, has decisively clarified the position of maintenance agreements during the period of the court's jurisdiction to award maintenance. The difficulties to which this decision gives rise are connected with the period of time during which section 19 of the Matrimonial Causes Act, 1950, is operative and the position of the wife when section 19 ceases to afford her any right to maintenance from the court. In other words, a time will come when the wife has no claim either in the courts or by way of a contractual agreement. Indeed, she will be between the devil and the deep blue sea. The first problem concerns the interpretation given to subsections (2) and (3) of section 19 (*r*). These provisions give the court power, if it thinks fit, to direct the husband "to pay to the wife during their joint lives, such monthly or weekly sum for the maintenance and support of the wife, etc. . . ." (subs. (3)) or to order the husband, "to the satisfaction of the court, [to] secure to the wife such gross sum of money, etc. . . ." (subs. (2)) *on any decree* for divorce or nullity of marriage. The court in *Bennett's Case* gave their ruling on the interpretation of these

(*o*) [1952] 1 K.B. 249, at p. 261.

(*p*) [1951] P. 378.

(*q*) s. 23 of the Matrimonial Causes Act has recently undergone a spate of litigation on the interpretation of its meaning. See three cases, *Scott* v. *Scott* [1952] P. 193, C.A.; *Scott* v. *Scott* [1952] P. 245; *Woodward* v. *Woodward* [1952] P. 303.

(*r*) Subs. (1) deals with the court's power to make interim orders for the payment of alimony on any petition for divorce or nullity of marriage, and is not relevant to the present discussion.

italicised words in the light of two previous decisions. In *Scott* v. *Scott* (*s*), it was decided that " ' on any decree for dissolution of marriage,' in section 1 (1) of the Matrimonial Causes Act, 1907 (*t*), means at the time of the decree or ' within a reasonable time ' after the decree having ' regard to all the circumstances of the case.' " Somervell L.J. in *Bennett* v. *Bennett* (*u*) explained that " decree " in the statute might therefore be read as meaning decree absolute. Furthermore he was of the opinion that it cannot be before the hearing until when there is no jurisdiction.

In another case, *Fisher* v. *Fisher* (*a*), the Court of Appeal allowed an appeal by the wife seven years after a decree, the wife having in the interval relied on a continuance of payment of alimony and an undertaking by her husband to settle certain property on her. Negotiations broke down and the court agreed that she ought to be allowed leave to apply for maintenance. More recently the Court of Appeal in *Shott* v. *Shott* (*b*) (which will be discussed more fully) said that decisions reported on construction of the words " on any decree for divorce " in section 190 (1) of the Judicature Act, 1925, now section 19 of the Matrimonial Causes Act, 1950, showed great latitude. It was not possible, the court said, to lay down any general rule that 18 years was too long. It was a matter of discretion, and the court in the instant case felt it had proper material for refusing the application.

There thus comes a moment after the divorce, which in view of the decisions it is extremely difficult to pin-point, where a wife has no longer a *right* to claim maintenance. At that moment there can be no objection to the wife's, and indeed no obstacle to her concluding a maintenance agreement. Naturally enough, the wife's position is unenviable. Any agreement she may make is always liable at a future date to be avoided should the court consider that at the time of concluding it section 19 was still available to her and thus her bargain was illegal as ousting the court's jurisdiction. It is submitted that there is a flaw in the statute which aims to provide the means to protect the wife by ensuring that " the wife and children of a divorced husband should not be left dependent

(*s*) [1921] P. 107.

(*t*) The only difference in the wording between the 1907 Act and the 1950 Act is the substitution of " divorce and nullity " for the word " dissolution." In the recent case of *Snelling* v. *Snelling* [1952] P. 259, Wallington J. (at 261) said: " . . . for all practical purposes the substance of these sections from time to time is the same as the provision contained in s. 19 of the Matrimonial Causes Act, 1950, or that they are so similar in expression as to be indistinguishable in effect, for any practical purposes from the provisions of that section "; see also *infra*.

(*u*) [1952] 1 K.B. 249, at p. 256.

(*a*) [1942] P. 101.

(*b*) [1952] 1 All E.R. 735.

on public assistance or on charity when he has the means to support them " (*c*). Is it possible that the courts can find a remedy for the wife in such cases without the inevitable delay of seeking parliamentary revision of the statute ?

Counsel for the wife in the recent case of *Snelling* v. *Snelling* (*d*) appears to have protected his client from ever being in the awkward position discussed above. In that case the parties to the action were married in 1927. A decree *nisi* was pronounced in the wife's favour in 1951, the decree absolute being granted only five days before the wife's remarriage. Her second husband died only three weeks after the ceremony. The wife, although amply provided for by her second husband, applied for maintenance against her first husband and was awarded the nominal amount of 1s. per annum. Thus, having established her claim, she could seek the court's aid to vary the order awarded, should the need arise (*e*). The husband appealed from the decisions of the registrar, claiming that the wife's remarriage deprived her of her rights under section 19. Wallington J., in rejecting the husband's plea, relied on *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite* (*f*), which, he said, laid down that the remarriage of a wife who seeks to obtain (in that case a wife who had in fact obtained) an order for maintenance is not enough to put an end to her right to apply for and, in a proper case, to obtain a maintenance order against her first husband (*g*). The learned judge did not discuss any question of time-limit within which the wife must apply, but presumably the same rules apply even more strictly, for her remarriage and her delay in applying will be sufficient reason for the court to reject a later application.

The answer then seems to be that on a decree for a divorce, a wife should always be advised to claim maintenance, however meagre such allowance awarded might be, so that she will always have access to the courts. This will not, however, be of much avail to the countless wives who are divorced and are in receipt of allowances only by way of agreement made with their former husbands. Furthermore, the court, on a decree being granted, may not always feel disposed towards granting maintenance, although, it is submitted, the lacuna in the law as illustrated above should be sufficient reason to allow a nominal maintenance grant to be awarded in every case.

However, this does not dispose of the numerous cases in which maintenance agreements are still subsisting. The case of *Shott* v.

(*c*) *Per* Denning L.J. in *Bennett* v. *Bennett* [1952] 1 K.B. 249, at p. 262.
(*d*) [1952] P. 259.
(*e*) S. 28 of the Matrimonial Causes Act, 1950.
(*f*) [1948] 1 All E.R. 343.
(*g*) [1952] P. 259, at p. 265.

Shott (*h*) is particularly instructive in view of this state of affairs. In October, 1932, the wife obtained a decree *nisi*; a week before the decree absolute in April, 1933, an agreement was made whereby the husband covenanted to pay sums for the wife's maintenance. The wife accepted the covenant in full satisfaction of any claims she had for maintenance and alimony and agreed that so long as he paid she would not proceed with any petition for maintenance. In 1951 the wife applied to the court for an order of maintenance on the ground that this agreement was unenforceable in view of Devlin J.'s decision at first instance in *Bennett* v. *Bennett* (*i*). The court refused her application by reason of the interpretation of the words used in section 19 (2) of the Matrimonial Causes Act, 1950, previously section 190 (1) of the Judicature Act, 1925 (*k*).

If the wife had merely asked for the deed to be made enforceable, would the court have agreed to do so knowing that the agreement at the time of its being drawn up was illegal and void? Section 19 of the Matrimonial Causes Act, 1950, as the court found, was no longer operative. The only hint to the court's attitude on this aspect of the case was given by Jenkins L.J. He said that if the husband was seeking to set up the invalidity of the deed, the court might entertain an action by the wife (*l*). It is not quite clear if the learned Lord Justice was referring to an action started by the husband or to the husband's seeking to have the deed declared invalid by way of defence to a wife's claim of its enforceability. If the former, then, following the dictum of Jenkins L.J., the wife might find her remedy in the courts, but assuming this to be true, the husband is not likely to seek the court's ruling, but will cease payments under the agreement and sit tight awaiting a fruitless (as it appears) action against him. If it is the latter meaning, then the court will be pressed to decide the status of the contract on its merits. The problem resolves itself into a question whether the contract, which was certainly illegal and void when it was made and continued to be so during the effective period of the court's jurisdiction under section 19 of the Matrimonial Causes Act, 1950, ceases to be void when the divorced wife no longer possesses the rights accorded to her under the section. It may rightly be said that the court is hardly likely to regard an agreement which at its inception is illegal and void for reasons of public

(*h*) [1952] 1 All E.R. 735. It may be observed that the Court of Appeal's decision in *Shott* v. *Shott* was before its decision in *Bennett* v. *Bennett* and does not appear to have been cited to the court in the latter case. Somervell L.J. was, however, a party to both decisions.

(*i*) [1951] 1 All E.R. 1088; and see footnote (*h*), *supra*.

(*k*) *Supra*.

(*l*) [1952] 1 All E.R. 735, at p. 737.

policy as validated owing to the lapse of the time during which the wife could have applied under section 19. One objection to this argument is that a wife can hardly be expected to seek the court's assistance during a period in which she is receiving adequate maintenance under an agreement which she believes to be binding on both herself and her husband. It is submitted that the courts will recognise this. But this does not remove the objection that the court would hardly give validity to a contract which was certainly illegal and void during the period of the court's jurisdiction in the matter.

One way round this dilemma might be the contention that only a part of the deed was illegal and that the parts were severable. In *Bennett* v. *Bennett* (*m*), Somervell L.J. discussed the analogy of restraint of trade cases, citing the example of *Goldsoll* v. *Goldman* (*n*), where there was an agreement for a sale of a business which contained a covenant by the vendor not to deal in real or imitation jewelry in the United Kingdom or in various countries abroad. The covenant was restricted by the court to the United Kingdom and to dealings in imitation jewelry, the remaining provisions being unenforceable. The severability is unilateral, only the excessive parts of the restraint being removed, the purchase price for the business remaining intact. The learned Lord Justice contended that such severability was only justified if what was struck out was strictly subsidiary to the main purpose of the agreement. Furthermore, the nature of a void (*o*) covenant in a restraint of trade agreement does not render the deed totally ineffective; certain parts of the deed can be sued on (*p*).

In the case of maintenance agreements, however, the promise made by the wife not to invoke her rights to maintenance can hardly be considered as a subsidiary feature of the agreement. It is the very essence of the whole contract. There seems to be no other course then, other than to say that the contract is void *ab initio* and remains always a dead letter or that it is possible to revive the agreement on the illegal cause disappearing. For reasons stated above, the courts are unlikely to adopt the latter course. One further possibility presents itself. Is it possible that a valid contract exists if, at the point of time when section 19 of the Matrimonial Causes Act, 1950, ceases its protective powers to the wife, ratification of the void agreement is made by the wife

(*m*) [1952] 1 K.B. 249, at p. 253.
(*n*) [1915] 1 K.B. 292.
(*o*) For a discussion of recent developments in the application of the rules governing the severance of illegality in contract, see Norman S. Marsh, "Severance and Public Policy—An addendum," 69 L.Q.R. 111.
(*p*) Cheshire and Fifoot, *Law of Contract*, 3rd ed., p. 276–7.

continuing to accept sums of money by way of maintenance from the husband who makes payment in consideration of the wife's implied promise to maintain herself and her children? If this were acceptable, might one not even see the *High Trees* principle being applied by the wife to an action by the husband as to the unenforceability of such agreement?

Whatever solution the courts may deem advisable, one cannot help feeling that the wife under the present law on this subject is not in an enviable position.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Mornington Permanent Building Society v. *Kenway and Others*
[1953] 2 W.L.R. 859; [1953] 1 All E.R. 951

Registered land—tenant in possession—mortgage—Land Registration Act, 1925, *s.* 70 (1) (g).—This is the latest in the recent series of cases commencing with *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 All E.R. 901 (see Vol. 15, p. 184), and dealing with the rights of a tenant who has been allowed into possession of property before his landlord has completed its purchase, when on the day of completion the landlord executes a mortgage without disclosing the tenancy.

The present case was indistinguishable on its facts from *Woolwich Equitable Building Society* v. *Marshall* (1952) Ch. 1; [1951] 2 All E.R. 769 (see Vol. 15, p. 437). The property was registered land and had been transferred to the defendant on the same day as a mortgage was made by him to the plaintiffs. The power of leasing was, of course, excluded, but prior to the transfer the defendant had let into possession two people to whom he had agreed to give tenancies of parts of the premises. When the instalments due under the mortgage fell into arrears, the plaintiffs sought possession of the premises, but the tenants claimed that they were entitled to remain. Vaisey J. held they were so entitled following the *Woolwich Case* (*supra*), as they had an overriding interest as persons in actual occupation under section 70 (1) (g) of the Land Registration Act, 1925.

The real interest of this case lies in the fact that Vaisey J. said *obiter* that he agreed with Harman J.'s decision in the *Coventry Case* (*supra*), where the facts were similar but the land was not registered, and quoted in support of it *Re Connolly Brothers, Ltd.* (*No.* 2) [1912] 2 Ch. 25, a case which has previously been overlooked. In the *Coventry Case* (*supra*) Harman J. found that the conveyance and mortgage had been in truth one transaction, the mortgagee's money enabling the mortgagor to purchase. As a result he held that the mortgagor had at no time been the unencumbered beneficial owner of the property, and thus the tenant's equitable interest (an agreement for a lease) could not, by estoppel, become a valid legal tenancy as against the mortgagee.

In *Re Connolly Brothers, Ltd.* (*supra*), a company had issued debentures on their assets which created a floating charge and provided that no other charge should take priority. The company then wished to buy certain property, but not having the money, borrowed from O. subject to a charge on the property in O.'s favour. The Court of Appeal refused to shut their eyes to the real nature of the transaction

and held on the facts that the unencumbered fee simple never passed to the company, and therefore O.'s charge took priority.

When discussing this point in the *Woolwich Case* (*supra*), Danckwerts J. took the completely different view that the whole matter was governed by the recitals. If, said his Lordship, the mortgagor was described in the mortgage deed as beneficial owner, the mortgagee could not object if it was taken to be true, and the tenant must be deemed to have acquired a valid legal interest which had vested before the execution of the mortgage. It is important to notice in the *Woolwich Case* that apparently no evidence was given that the mortgagor could not complete the purchase without the mortgage money.

The other cases in this series, *Universal Permanent Building Society* v. *Cooke* [1952] Ch. 95, and *City Permanent Building Society* v. *Miller* [1952] Ch. 840, give no assistance with regard to this conflict. It will be very interesting to see in what way it will finally be resolved, but in the meantime, in cases of this kind the tenant's position is very uncertain where there is any evidence that the mortgage money was vital to the purchase, except in the case of registered land.

Rosenfield v. *Newman* [1953] 1 W.L.R. 558; [1953] 1 All E.R. 840

Trespass—estoppel—election to abandon claim.—When is there an election to abandon a claim within the words of Lord Blackburn in *Scarf* v. *Jardine* (1882) 7 App.Cas. 345, at p. 360? In the present case Parker J. considered a new set of circumstances arising from a claim for the possession of land.

The plaintiff owned a house occupied by the defendants, and brought proceedings in the county court for possession on the ground of trespass or, alternatively, if the defendants were tenants and protected by the Rent Acts, on the ground that the assignment or subletting to them had been without his (the plaintiff's) consent. It appeared at the hearing before the county court judge that the annual value of the house was over £100 and therefore the county court judge had no jurisdiction in trespass. The plaintiff then elected to proceed on the alternative ground, and the county court judge held that this ground failed as there was no evidence that the defendants were tenants either statutory or contractual. The plaintiff then brought proceedings for possession in the High Court on the ground of trespass and both sides contended that the county court proceedings raised an estoppel against the other.

Parker J. found for the defendants and held that the county court judge had not found that the defendants were trespassers because that was the very thing he had no jurisdiction to find; on the contrary, the claim on the ground of trespass was one which had been specifically abandoned by the plaintiff. This was not a case of an agreement between the parties that before the county court judge only, the matter should proceed on the basis that the defendants were tenants; on the contrary there had been a final election by the plaintiff whether he intended it or not to treat the defendants as tenants (see *Scarf* v. *Jardine* (*supra*)) and therefore the plaintiff was estopped from showing that the defendants were trespassers.

It can hardly be said that justice was done to the plaintiff in this case, but at least it will act as a warning to prevent others finding themselves in a similar position in future.

R. P. C. Holdings, Ltd. v. *Rogers* [1953] 1 All E.R. 1029

Right of way—common law prescription—change in dominant tenement.—" . . . You cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed . . . ": *per* James L.J. in *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875) 1 Ch.D. 362 at p. 368.

The defendant owned a field adjoining a golf course of which the plaintiffs were lessees. It was found that the owners of the field had, from time immemorial, exercised a right of way from the field over a defined track on the golf course to the highway. The defendant wished to use the field as a caravan camping site and claimed that his right of way was not confined to agricultural purposes, and therefore that he was entitled to use the track for the passage of caravans and other vehicles.

Harman J. held that he was not so entitled. He came to this conclusion after a detailed consideration of *Cowling* v. *Higginson* (1838) 4 M. & W. 245, *Williams* v. *James* (1867) L.R. 2 C.P. 577, and the *Wimbledon Case* (*supra*). The learned judge's conclusion was that the question was one of fact which he, as a jury, would have to decide, but that he must not find that the right was a general one merely because the land had been used for all purposes while in one particular state. He had no doubts on the facts that the right of way was limited to agricultural purposes, and that to extend it for the use proposed would be an unjustifiable increase of the burden of the easement. (See *per* Mellish L.J. at p. 370 in the *Wimbledon Case* (*supra*).)

Walsh v. *Oates* [1953] 2 W.L.R. 835; [1953] 1 All E.R. 963

Easement—effect on private right of way of order stopping up highway—section 91, *Highway Act,* 1835.—The Court of Appeal found in this case that it is clear law that the stopping up of a highway under the Highway Act, 1835, extinguishes the public right but it does not affect any private rights of way which can be proved to have accrued before the road became a public highway.

After referring to *Wells* v. *London, Tilbury and Southend Ry.* (1877) 5 Ch.D. 126, and *Allen* v. *Ormond* (1806) 8 East 4, Singleton L.J. said: " An order made by quarter sessions for stopping up a highway under the provisions of the Highway Act, 1835, s. 91, is an order made against the public. Section 91 provides that ' the proceedings thereupon shall be binding and conclusive on all persons whomsoever.' No one can dispute the proceedings but . . . that does not mean that one who has a private right of way is thereby barred for all purposes from exercising that right of way."

Riley v. *Troll* [1953] 1 All E.R. 966

Contract for sale.—This was a case at Manchester Assizes before Ormerod J. The defendant had signed a printed agreement form in which she agreed to purchase a house, and the form ended with the words " This agreement is subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require." The defendant not wishing to proceed with the contract, refused to perform it on the ground that it was unenforceable.

The learned judge found for the defendant and held that the concluding words " if the vendors shall so require " qualified merely the preparation of a contract by the vendors' solicitors and did not qualify the whole sentence. An effective qualification of the words, " this agreement is subject to formal contract," must be both clear and definite.

Re Harrow Literary Institution [1953] 1 All E.R. 838

Defunct literary institution—application of funds.—In this case Vaisey J. was asked to authorise the dissolution and transfer of assets of a literary institution governed by the Literary and Scientific Institutions Act, 1854, which had ceased to exist and had been purportedly dissolved in 1894 but without the three-fifths' majority required by section 29 of the Act. In 1894 the property of the institution had been sold and the money vested in trustees, who in 1951 had applied to the county court for an order for the application of the assets under section 30 of the Act. The county court judge had held that in these circumstances no jurisdiction was conferred on him by the Act, and so an application was then made to the Chancery Division. Vaisey J. said that he could not order the dissolution of the institution as it had dissolved itself and vanished into thin air, but he did order, on the assumption that the institution no longer existed, that the trustees be authorised to transfer the money to the county council to be used in the equipment of a museum in the county library. This purpose, said his Lordship, was clearly within the sense and meaning of the Act of 1854.

Tisdall v. *McArthur & Co. (Steel & Metal), Ltd.* [1953] Ir.R. 228.
See also L.J. Newspaper, 1953, p. 290

Easement of light.—In this case the Irish Court of Appeal held that an easement of light could be acquired by prescription where the light came to the windows of the dominant tenement through a glass roof on the servient tenement. Kingsmill Moore J. had also held in the court below that in addition, in these circumstances the easement could be acquired under the doctrine of lost modern grant. It would seem most likely that English law is the same in these circumstances, though there is apparently no existing authority on the point.

Att.-Gen. for Alberta v. *Huggard Assets, Ltd.* [1953] 2 W.L.R. 768

Royalties—rents—certainty.—In this case before the Judicial Committee which dealt chiefly with certain Canadian legislation, Lord Asquith of Bishopstone who delivered the judgments of their Lordships, said, at p. 775, in considering the argument that a rent must be " certain," that it was doubtful if a rent was uncertain because the amount depended upon the whim from time to time of the grantor. The only authority cited to the board was the obscurely reported case of *Parker* v. *Harris* (1692) 1 Salk. 262, where the uncertainty seemed to depend upon the time of payment rather than on the amount payable. His Lordship described as " uncertain " a rent payable in " year one " the amount of which depends upon events to happen in " year three," but short of this " it is clear that a fluctuating rent is not as such necessarily ' uncertain,' certainly not if it is mathematically calculable, . . ."

It is also interesting to notice that their Lordships said in this case they were of the opinion that the Statute of Tenures, 1660, was not intended to apply outside England and Wales because its objects were purely local, (*i.e.*, to abolish oppressive incidents of feudal military tenure), and it did not therefore apply to Canada.

Blount v. *The War Office* [1953] 1 W.L.R. 736; [1953] 1 All E.R. 1071

Requisitioned house—property stored in locked room—bailment.—In this case at Birmingham Assizes Ormerod J. held that where the plaintiff had stored some of his goods in a strong room in his own house with the consent of the defendants who had requisitioned the house, the defendants had become voluntary bailees. The learned judge rejected the contention that the goods had remained in the constructive possession of the plaintiff because the room was locked, and therefore not under the defendant's control, and he said, " The power to requisition is a power to requisition land, and everything which is on the land in the way of buildings. . . . It appears to me that in those circumstances the defendants, in allowing the plaintiff to store his goods . . . in the strong room, did in fact take possession of the goods. . . ."

Loudon v. *Ryder* (*No.* 2) [1953] 2 W.L.R. 863; [1953] 1 All E.R. 1005

Slander of title—no malice—declarations as to plaintiff's title—R. S. C., Ord. 25, *r.* 5.—In this case, the defendant wrongly but honestly claimed that the plaintiff was not entitled to certain property. As the plaintiff's action was in effect a claim of slander of title, it failed as there was no malice, and the plaintiff could get neither damages nor an injunction. Harman J. held, however, that as the defendant persisted in his claim to relieve the plaintiff from starting a new action the court could make a declaration as to the plaintiff's title to the property under Ord. 25, r. 5, and he referred to *Guaranty Trust Company of New York* v. *Hannay* [1915] 2 K.B. 536.

Leslie Maurice & Co., Ltd. v. *Willesden Corporation* [1953] 2 W.L.R. 892; [1953] 1 All E.R. 1014

Housing—date for determining whether works can be executed at reasonable expense—Housing Act, 1936, *s.* 9.—In this case the Court of Appeal held that in the case of an appeal to the county court from a notice served under section 9 of the Housing Act, 1936, the county court judge should come to his decision upon all the facts as he finds them at the date of the hearing, and not as they were at the date the notice was served.

It should be explained that in the present case the notice was served under the Middlesex County Council Act, 1944, s. 260 (1), as well as under the Housing Act, 1936, and that as the " person having control," a lessee, had acquired the freehold by the time of the hearing, it was held that he had lost a ground for special consideration under section 260 (2) of the Middlesex Act.

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2. *TRUSTS*

Re Gestetner's Settlement [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150

Settlement—power to distribute to fluctuating and unascertainable class—validity.—This is an interesting case of importance involving a settlement of some novelty. The trustees were to hold the capital of the settled fund for such members of a specified class as they might appoint in writing, and subject to such exercise they were to stand possessed of the trust fund for the settlor's children at 21. The specified class included four named persons, descendants of the settlor's father or uncle, the spouses of such descendants, five charitable bodies, former employees of the settlor and his wife or their widows or widowers, and any present or past director or employee of a named company or their spouses, but so as to exclude the settlor and any wife of his, and the trustees. The summons arose because the Inland Revenue Commissioners, on the ground that the whole trusts were void, had refused to recoup to one of the charitable bodies in the specified class the income tax borne by the trustees on a payment made to the charity in exercise of the trustees' discretion.

It was argued that the power of selection given to the trustees, being a power coupled with a duty, was bad because it was impossible to know the limits of the area of selection. The trustees could not exercise their duty of considering the relative merits of the beneficiaries if they did not know who they all were.

Harman J. held, applying *Re Park* [1932] 1 Ch. 580, and *Re Jones* [1945] Ch. 105, that a power may be good even though it is exercisable in favour of an indefinite class, provided there is no trust or obligation upon the donee. (See *per* Clauson J. in *Re Park* (*supra*) at p. 582.) However, the learned judge said that it was to be inferred from *Re Ogden* (1933) Ch. 678 that " . . . where there is a plain duty on a trustee to select from a number of persons which of them shall be the recipients of the testator's bounty, there must be

certainty among those recipients." The test in such a case appears to be whether, if all the beneficiaries can if they so agree, come to the court and have the fund distributed equally, thus ending the trustees' discretion. Harman J. approved of the criticism of Fry J.'s words in *Blight* v. *Hartnell* (1881) 19 Ch.D. 294 at p. 301, in Farwell on Powers, 3rd ed., at pp. 168, 169, which he agreed stated the position too widely.

In the present case therefore the question was whether there was a duty or not, and if so what it was. The learned judge came to the conclusion that the trustees had a duty, but that it was only a duty to consider at all times during which the trust continued, whether or not they were to distribute any part of the fund, and if so to whom. There was no duty to distribute the whole fund amongst members of the specified class, or before parting with any sum to survey the whole field of possible beneficiaries. As there was merely this duty to consider and none to distribute the fund, in the absence of any authority to the contrary, the trust was good. The learned judge pointed out that the position would have been quite different had it been impossible to ascertain whether any given person was a beneficiary or not, but there being no uncertainty in that sense, his Lordship felt that mere uncertainty as to the number of beneficiaries would not invalidate a trust worded in this way.

This case breaks entirely new ground on the relationship of powers, particularly hybrid powers (see *Re Park* (*supra*)), and trusts, and as settlements of this general type are, for tax reasons, becoming increasingly common, it is probably the forerunner of much new authority of considerable importance.

Re Robb [1953] 2 W.L.R. 819; [1953] 1 All E.R. 920

Accumulation—validity of power to accumulate—implied direction —destination of surplus income—Law of Property Act, 1925, *s.* 164.— The interesting question which Danckwerts J. had first to decide in this case was whether a power contained in a will to accumulate surplus income, as distinct from a direction to do so, was contrary to the provisions of section 164 of the Law of Property Act, 1925. He held that it was, and said, " whilst a power to accumulate unlimited in form need not be necessarily bad in itself, it could not be exercised lawfully by the persons to whom such a power has been given, . . . so as to accumulate for a longer period than twenty-one years from the death of the testator; . . . any other result would be contrary to the prohibition which is contained in the opening words of sub-section (1) of section 164."

The testator had directed that his residue should be held on trust for sale, that " out of the annual income " annuities should be paid to his wife and his daughter, and that after their deaths the residue should, in short, be held in equal shares for all his grandchildren who attained the age of 25 years before the expiration of 21 years from the death of the survivor of the annuitants. The trustees were empowered to accumulate the surplus income, if any. The testator had died in 1916 and his widow in 1921. His daughter was still

alive and her annuity being duly paid. For 21 years after the testator's death the trustees had accumulated the surplus income, and thereafter had divided it between the testator's next-of-kin until doubts arose as to whether they were taking the correct course.

Having dealt with the first problem, the learned judge found, secondly, that apart from the power to accumulate, there was in the will an implied direction to accumulate which also infringed section 164. (See *Tench* v. *Cheese* (1855) 6 De G.M. & G. 453, and *Mathews* v. *Keble* (1868) L.R. 3 Ch. 691.) This direction was implied because the annuitants were given the benefit of a continuing charge on the income of the residuary estate, and were therefore entitled, should the income in any particular year be insufficient, to have the annuities made up out of the income of previous years. This, according to the principles laid down by Romer L.J. in *Re Coller's Deed Trusts* [1939] Ch. 277 at pp. 281–2, necessarily involved an accumulation.

The question then arose as to what was the correct destination for the surplus income after the accumulation period had expired. Danckwerts J. found that as nothing was given in the will to the grandchildren until after the death of the survivor of the annuitants, he could not distinguish the present case from *Berry* v. *Green* [1938] A.C. 575, or bring it outside the principles laid down by Lord Maugham L.C. in that case at p. 582, and therefore the income was undisposed of and should go to the next-of-kin.

(See article, *ante*, p. 199.)

Re Sutherland Settlement Trusts [1953] 2 W.L.R. 1163; [1953] 2 All E.R. 27

Settled land—improvements—repairs executed before November 1, 1948—*Settled Land Act,* 1925, *s.* 73 (1) (iv) *as amended by Agricultural Holdings Act,* 1948, *s.* 96 (1).—This is another case dealing with what Vaisey J. described in *Re Duke of Northumberland* [1951] Ch. 202 (see note, Vol. 15, p. 116), as a "welter of confused and confusing enactment" brought about by the amendment of section 73 (1) (ii) and (iv) of the Settled Land Act, 1925, by section 96 (1) and section 81 (1) of the Agricultural Holdings Act, 1948.

The present case concerned expenditure out of income *before 1948* on repairs to agricultural property held in strict settlement. The tenant for life had assigned his interest to an estate company which he controlled. The repairs and improvements were such that, before 1948 nobody could have considered them as payable out of capital, a large number of them had been done to properties which had been let by the estate company to the tenant for life. In 1952, the tenant for life, purporting to act under section 75 (2) of the Settled Land Act, 1925, directed the trustees of the settlement to apply capital money to cover the cost of the repairs, and the trustees refused. Harman J. found that they had done rightly.

His Lordship held that as the repairs had not been done before 1948, they had not been done "under or in pursuance of the Agricultural Holdings Act, 1948," within section 73 (1) (iv) as amended,

nor " under any similar previous enactment or under custom or agreement or otherwise," and that the words " or otherwise " must be read *ejusdem generis* with the preceding words and mean " otherwise under some obligation." The repairs in question had, of course, been done voluntarily and they could not be paid for out of capital.

Harman J. held that even if he were wrong on the point above, the trustees had a discretion under section 75 (2) as to how they should apply the money in default of a valid direction from the tenant for life. In the present case the tenant for life had failed to act as a trustee for all parties in the exercise of his powers under section 107 (1), Settled Land Act, 1925. The direction he had purported to make merely relieved his own pocket and was invalid. Finally, following *Re Borough Court Estate* [1932] 2 Ch. 39, the trustees' discretion was one which ought not to be exercised to authorise repayment out of capital as the repairs had not been done by the tenant for life on the faith that he would be reimbursed in this way.

His Lordship then referred to *Re Duke of Northumberland* (*supra*) which would have appeared to stand in the way of his decision. He thought that there Vaisey J. had made a slip when dealing with the points in issue in the present case because of the number of other difficult questions he had to decide. Vaisey J. had assumed that all the repairs had been done under or in pursuance of the Act of 1948, and had given no detailed consideration to the wording of section 73 (1) (iv) and particularly to the meaning of the words " or otherwise." No difficulty arose under section 75 (2) in that case as there the tenant for life was not putting money into his own pocket. Harman J. felt therefore that the case did not bind him.

The ambit of the decision in *Re Duke of Northumberland* is extremely uncertain (see Vol. 15, p. 116) and unfortunately the present decision has only removed an ambiguity of comparatively small and decreasing importance. It is certain that unless there is a re-enactment of the law of settled land improvements, there will arise a new line of authorities of great complexity largely created by " this inappropriate and inconvenient use of what may be called ' referential legislation '."

Re Thompson Settlement Trusts [1953] 2 W.L.R. 978; [1953] 1 All E.R. 1139

Power of appointment—hotchpot—valuation of life interest—interest payable.—What is the correct basis of valuation of a life interest for the purposes of hotchpot, when the life tenant has died before the valuation is made? Roxburgh J. held in this case, solving a considerable conflict of authority, that the proper basis was the actuarial valuation of the life tenant's expectation of life at the date when the interest fell into possession, and that the actual period of the life tenant's survival was irrelevant.

The donee of a power of appointment, given by his marriage settlement and exercised by his will, appointed valid life interests to six persons and made other appointments which in the present case were found to be invalid. In the marriage settlement it was provided that on default of appointment the trust fund should be held for the

donee's children (there were four) in equal shares, but that any validly appointed share should be brought into hotchpot. The donee died in 1933, one of the life tenants, who was the donee's daughter, died in 1941, and the present case arose because of doubts which had arisen as to whether the trust fund was being properly administered.

Roxburgh J. discussed the Irish case of *Re Westropp* (1903) 37 Ir. L.T. 183 (cited [1921] 1 Ch. 541), which is a direct authority to the effect that an actuarial valuation is the correct method of assessment, but that case was adversely commented upon by Astbury J. in *Re West* [1921] 1 Ch. 533. Roxburgh J. in the present case thought that *Re West* (*supra*) was not a case in point at all, as there the life interest had failed entirely, and he turned to the comments of Evershed J. *obiter* upon these cases in *Re North Settled Estates* [1946] Ch. 13 at p. 16. Evershed J. was there of the opinion that the headnote at least in *Re West* (*supra*) was too widely stated, and that the proper view was that any events which occurred after a life interest fell into possession should *not* be taken into account in hotchpot cases, and he explained the difference between the principles applicable in these cases and in those applicable to annuities. Roxburgh J. was much troubled by the fact that if a different principle was to be applied, the quantum of the beneficial interests would depend upon the accident of when an application was made to the court. He agreed with Evershed J.'s opinion, and held that the actuarial valuation as at the date the interest fell into possession was the correct one.

Roxburgh J. also decided that life interests thus valued should *not* be brought into hotchpot with interest. He thought that interest did not come into the matter. The larger share of capital taken by a beneficiary under the hotchpot rules is intended as a rough-and-ready compensation for the interest which accrues to the life tenant, and there can therefore be no question of a claim for interest after the life tenant's death.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

I. R. C. v. *City of Glasgow Police Athletic Association* (H.L.) [1953] 2 W.L.R. 625; [1953] 1 All E.R. 747

Purposes only incidentally charitable—police sports.—This is a decision in a Scots appeal, but on a point of English law. It turned on the question whether the Association was formed for "charitable purposes *only*" and is therefore of limited importance. The Association was formed to promote police sports and athletics. Members paid a small subscription which was deducted from their pay. Sports and athletics are not in themselves charitable objects. It was held that the main purpose of the Association was self-help, the provision of recreation. The existence of such facilities may have helped recruitment to the police force, and the fitness and efficiency of that police

force would benefit from the exercise involved, but these were secondary objects. In any case it could not be said that the sole purpose of the Association was charitable,

(Theobald 279.)

Re Hutchinson's Will Trusts [1953] 2 W.L.R. 872; [1953] 1 All E.R. 996

Trust for purposes of institution survives merger of institution.—The testator bequeathed the proceeds of residue to five hospitals in Nottingham. One of these, the T Hospital, was described as at a particular address. After the execution of the will the hospital had closed down and its assets and patients were taken over by the G Hospital, one of the other beneficiaries under the will. The latter hospital held the assets of the T Hospital on trust for a wing of the G Hospital which carried on the work of the T Hospital. The National Health Service Act, 1946, applied to the G Hospital. The testator died in 1952. Upjohn J. held that the testator meant to benefit the work of the T Hospital, rather than that particular institution, and the bequest therefore passed as an asset to the G Hospital. (following *Re Withall* [1932] 2 Ch. 236; *Re Faraker* [1912] 2 Ch. 488; *Re Lucas* [1948] Ch. 424).

Recent cases have illustrated the conflict between company law and the law of charitable trusts. A similar conflict arose in this case. The T Hospital's rules did not provide for an amalgamation and it had never altered its rules. The amalgamation had never been approved by the Charity Commissioners though it had been approved by the Minister of Health. This was held irrelevant on the general question of the destination of the funds in this case.

(Theobald 285.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Langston [1953] 1 W.L.R. 581; [1953] 1 All E.R. 928

Revocation—Law of Property Act, s. 177—*will in contemplation of marriage.*—A will gave a testator's whole estate "to my fiancee Maria Edith Beck." It was held that this was a will in contemplation of marriage and therefore not revoked by the subsequent marriage to Maria. An earlier unreported case of *Re Knight* (1944) had held that a reference to a "future wife" was enough (cited in Tristram and Coote's Probate Practice, 19th ed., p. 25). Three nieces who had presumptive claims on intestacy agreed to the grant of probate in any case.

(Theobald 37.)

In the Estate of Wippermann [1953] 2 W.L.R. 706; [1953] 1 All E.R. 764

Oral evidence of existence and contents of will—burden of proof.—Pearce J. held that proof of the existence of a will requires the establishment of a reasonable probability, and that there is no need to supply overwhelming proof. A dictum of Lord Herschell in *Woodward* v. *Goulstone* (1886) 11 App.Cas. 469 was not applied. The circumstances of this case were unusual. The deceased had been a victim of persecution by the Nazis and had fled from country to country. In 1936 he had made a will in favour of his mother who predeceased him. As a result there was a distribution on intestacy and two of the three heirs *ab intestato* were Germans, whose shares would be taken by the Administrator of German Enemy Property. It was sought to propound by oral evidence an alleged will of 1942 contained in correspondence, in favour of the third heir, a British subject. This evidence failed to satisfy the court.

(Theobald 45.)

Re Walsh [1953] 2 W.L.R. 686; [1953] 1 All E.R. 982

Construction—" movables " limited by testator's usage to personal chattels.—The word " movables " may, prima facie, extend to a wide variety of things. In the instant case the testator listed a number of articles of personal use, *e.g.*, cufflinks and a revolver, which he described as " movables." He gave his wife the rest " of my furniture and movables . . . not consisting of mortgages, shares, bonds or securities absolutely." It was asked whether cash in the bank, the benefit of an insurance policy and various other sums of income on investments passed to the wife. Vaisey J. held that the testator had shown that he defined " movables " very narrowly, and that his references to mortgages and bonds referred to the documents evidencing the debts and not to the debts represented by them. In the event the widow took a life interest in all these sums under the gift of residue.

(Theobald 167.)

Re Nesbitt's Will Trusts [1953] 1 W.L.R. 595; [1953] 1 All E.R. 936

Construction—latent ambiguity—extrinsic evidence.—There were two general hospitals at Newcastle-on-Tyne, the Royal Victoria Infirmary in Queen Victoria Road, and the General Hospital. A will gave bequests to the Royal Infirmary, Victoria Street, and the Victoria Hospital, at Newcastle-on-Tyne. A previous revoked will made bequests to The Royal Infirmary, Victoria Road, and The Hospital, Newcastle. It was held that the word " Victoria " had obviously been transposed, and the two existing general hospitals took.

(Theobald 203.)

Construction—legatees taking residue.—A gift was made to a large number of charitable bodies and to the ministers of two churches, with a residuary gift to " the charitable institutions referred to by me in this my will." It was held that the two churches shared in the residuary gift since they were referred to, though not directly made legatees, and since the ministers would be trustees of the legacies left them, in the character of ministers, for the two churches.

(Theobald 275.)

Re Posner [1953] 1 All E.R. 1123

Legacy to testator's wife—marriage invalid—no fraud.—Residue was left to " my wife Rose Pòsner." It was alleged that the legatee was already married when she married the testator. The identity of the legatee was clear, the " wife " being a description only. No case of fraud was put forward. Karminski J. therefore held that Rose took the legacy. A gift to a legatee in a character he or she does not possess is only bad if the legatee fraudulently misrepresented his or her character. *Kennell* v. *Abbott* (1799) 4 Ves. 802, and *Wilkinson* v. *Joughin* (1866) L.R. 2 Eq. 319, were followed.

(Theobald 207.)

Re Mills [1953] 1 W.L.R. 554; [1953] 1 All E.R. 835

Certainty—endowment of bed in hospital—nature of " named " beds.—The testatrix bequeathed " such sum as shall be necessary to endow a bed," to be named the " Mills Bed," in a named hospital. The main point in this case was apparently not argued, namely, whether the gift failed for uncertainty. In fact Upjohn J. may have assumed the admission of the rule that where a testator supplies a measure by which the amount of a bequest can be ascertained it will not fail for uncertainty. The problem considered by the court referred to the amount of the bequest in the event. It was held that it did not refer to the actual cost of keeping a patient in a hospital but had become " purely conventional." For a number of years, up to 1948, £1,000 was the sum required by the hospital to name a bed for a benefactor. The present hospital authorities were willing to continue this practice in the present case. It was held that there had been a valid bequest to the hospital of £1,000, which would go into its general funds.

(Theobald 290, 536.)

Loudon v. *Ryder (No. 2)* [1953] 2 W.L.R. 863, *sub nom. Re Lewis' Declaration of Trust* [1953] 1 All E.R. 1005

Procedure—administrator.—It was held that a defendant cannot plead his own failure to apply for letters of administration on

intestacy so as to defeat an action against him for "jactitation" of title to property and claiming the right to a grant. *Aliter* in the case of a plaintiff suing as administrator, in which case the defendant may plead the absence of a grant to the plaintiff.

Wills—Practice Direction [1953] 1 W.L.R. 689

The Senior Probate Registrar points out that the Probate Division will apply the decisions in *In b. Gee* (1898) 78 L.T. 843, and *Royle* v. *Harris* [1895] P. 163, and refuse probate of later pages of a will where the will is signed on an earlier page, unless the earlier page refers to the later page so as to incorporate it. This is a useful guide to the draftsmen and resolves the extraordinary confusion referred to by W. J. Williams (Wills, p. 55 (*s*)).

(Theobald 30.)

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

R. v. *Minister of Housing, ex p. London Corporation* [1953] 2 W.L.R. 1083

Purchase notice—jurisdiction—duty of Minister.—This case makes two points. First a rather special one: that a freeholder of land subject to a lease at a ground rent only is not the "owner" of the land for the purposes of section 19 of the Town and Country Planning Act, 1947, and so cannot serve a purchase notice in respect of the land. Secondly, a point of general importance: the Minister, before confirming a purchase notice, must, if his jurisdiction to do so has been challenged, first satisfy himself that the jurisdiction exists; that is to say, that the notice is a valid one. He cannot confine himself to considering the matters (set out in section 19 (1) (a)–(c)) as to which the Act expressly tells him to "satisfy" himself before confirming the notice. The importance of this decision is, of course, that it provides a simple machinery for challenging the validity of a purchase notice: bring the point to the notice of the Minister, and he must decide it. If his decision is wrong, the Divisional Court will still have power to put him right.

Lincolnshire County Council v. *Wallace Holiday Camp, Ltd.* [1953] 2 W.L.R. 1088; [1953] 1 All E.R. 1143

Enforcement notice—defect in form—jurisdiction to quash—previous contravening development.—This case carries just a little further the question: Can a court of summary jurisdiction, hearing an appeal against an enforcement notice, quash it because it is bad in form? The general question remains undecided, although it is

becoming steadily clearer that the answer will be "No." Where, however, the defect is that the development complained of was carried out before the Town and Country Planning Act came into force (and the notice makes no mention of section 75, by which the procedure of enforcement by notice was applied to such development), then the justices can quash the notice: for once section 75 is left out of account, the development must have been development which did not require permission under the 1947 Act, and that is a case the justices can deal with. This is an eminently sensible decision: for section 75 contains a time limit, now expired, for the service of notices, so that for practical purposes development carried out before the 1947 Act is free from enforcement of planning control. Thus, a landowner served with an enforcement notice may well want to answer it by proving that the development is old development. It would be ridiculous if a decision of the justices to this effect could deprive them of jurisdiction to hear the appeal at all.

Biggs v. *Buckinghamshire County Council* (1953) 3 P. & C.R. 404

Revocation of planning permission—compensation for abortive expenditure.—This was a decision of the Lands Tribunal: the case being of a sort upon which (since appeal to the Court of Appeal will seldom be justified) the Tribunal will no doubt work out its own practice. Planning permission having been granted for the building of a house on certain agricultural land, the owner spent much time and some money on turning the site into a garden; but the permission was revoked before building of the house had begun. On a claim for compensation for expenditure rendered abortive by the revocation (Town and Country Planning Act, 1947, s. 21), the money expended in making the garden was held recoverable from the local planning authority; but not the value of the time and labour the owner had put into it, nor the cost of restoring the land afterwards to its original state.

Marks & Spencer, Ltd. v. *London County Council* [1953] 2 W.L.R. 932; [1953] 1 All E.R. 1095

Development charge—transitional provisions—unfinished buildings. —The majority decision of the Court of Appeal in this case has now been unanimously approved by the House of Lords. See 16 Conveyancer 69 and 224.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Drive Yourself Hire Co. (London), Ltd. v. *Strutt* [1953] 2 W.L.R. 953; [1953] 1 All E.R. 1036

Rent Restrictions Acts—assignment by subtenant with consent of tenant but not of superior landlord—covenant in sublease not to

assign without consent of tenant and superior landlord—enforceable by tenant only—assignee lawful subtenant—paragraphs (a) and (d) of First Schedule to 1933 *Act.*—A lease contained the usual qualified covenant by the tenant not to assign or sublet without the landlord's consent. The landlord gave consent to a subletting on condition that the sublease should contain a covenant not to assign or sublet without the landlord's consent. The sublease did, in fact, incorporate such a covenant. In due course, however, the sublease was assigned with the consent of the sublessor, but without the consent of the superior landlord. The sublease expired and the headlease expired, and the assignee of the sublease claimed to be entitled to remain in occupation as a lawful subtenant protected by section 15 (3) of the 1920 Act. Lynskey J. held that the assignee of the sublease was a lawful subtenant protected by section 15 (3). The provision in the sublease requiring the consent of the superior landlord to an assignment was a provision enforceable by the sublessor only, not by the superior landlord, who was not a party to the sublease. The sublessor had not chosen to enforce it. Lynskey J. refused to imply a term, in the original licence given to the tenant to sublet, binding the sublessor to enforce the covenant in the sublease requiring the sublessee to obtain the superior landlord's consent. He pointed out, however, and this is of interest to conveyancers, that the superior landlord could have retained control by both making his licence for the subletting expressly conditional on the insertion therein of a provision restricting the sublessee from assigning without the superior landlord's consent, and by requiring the sublessor to bind himself to enforce the covenant or by making it a term of the licence that the superior landlord should be a party to the sublease containing the covenant.

Among other points decided in the case was that paragraph (a) of the First Schedule to the 1933 Act did not apply, since no obligation of the *subtenancy* (which is the material tenancy for this purpose) had been broken or not performed, and that paragraph (d) did not apply, since the assignment, although made without the consent of the superior landlord, was made with the consent of the sublessor who was the assignor's landlord within the meaning of the paragraph.

(Rent Restrictions Guide, 3rd ed., pp. 106, 85, 89; Megarry, 6th ed., pp. 340, 193, 202.)

Thompson v. *Ward* [1953] 2 W.L.R. 1042; [1953] 1 All E.R. 1169

Rent Restrictions Acts—statutory tenant—occupation by licensee—preservation of tenancy for statutory tenant not function of licensee—statutory tenant's loss of rights.—A statutory tenant who had lived with his mistress in the dwelling-house for some time left, after differences had arisen, taking his possessions with him but leaving his ex-mistress in occupation. She lived there for some years, paying the rent. The tenant remarried and then, if not before, may be taken as having abandoned any intention of returning. However, he subsequently changed his mind and decided to return with his wife. He purported to determine his ex-mistress's licence, and, as she refused to leave, brought proceedings against her for possession of the house.

The landlord was not involved. The Court of Appeal held that the claim failed. The ex-tenant had no longer any interest in the premises which would enable him to claim possession. The occupant was not, to use the language of Asquith L.J. in *Brown* v. *Brash* [1948] 2 K.B. 247, 254, a licensee whose occupation was " with the function of preserving the premises for [the tenant's] own ultimate homecoming." The court pointed out that this decision did not affect the question of the tenant's obligations to his landlord. No notice to quit had been given as required by section 15 (1) of the 1920 Act, and the landlord might have been able to insist on the performance by the tenant of his obligations. This, however, was not the issue in the present case.

Perera v. *Vandiyar* [1953] 1 W.L.R. 672; [1953] 1 All E.R. 1109

Landlord and tenant—breach of covenant by landlord—cutting off gas and electricity with intention to evict—not a tort—punitive damages inadmissible.—In this case the landlord of a rent-controlled flat, the weekly rent of which included payments for gas and electricity, cut off the supplies of gas and electricity to a statutory tenant with a view to compelling the latter to leave. The tenant did in fact leave for a week and then returned. The county court judge awarded the tenant special and general damages for breach of contract and also punitive damages for a " deliberate and malicious " tort of eviction. The Court of Appeal held that the latter damages could not stand. There was no trespass involved in the landlord's action (which distinguishes the case from *Lavender* v. *Betts* [1942] 2 All E.R. 72) and the court was not satisfied that there is such a thing as a separate tort of eviction. The case was one of breach of contract only, and the damages should have been measured accordingly.

(Woodfall, 24th ed., Cumulative Supplement, No. 5, p. 43.)

R. v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Hierowski* [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4

Rent tribunal—Furnished Houses (Rent Control) Act, 1946—*change of circumstances—jurisdiction—certiorari.*—The jurisdiction of a rent tribunal to reconsider a rent entered on the register on the ground of change of circumstances, which is conferred by section 2 (3) of the Furnished Houses (Rent Control) Act, 1946, depends upon a change of circumstances, although it need not be the change of circumstances alleged by the person applying for reconsideration. It might be a change of circumstances put forward by his opponent, and thus lead to a revision of the rent in a different direction from that which the applicant intended. The tribunal, however, are restricted to considering the change of circumstances and cannot take the opportunity of going into the whole case *de novo* with a view to correcting a previous decision which they thought was wrong. In this particular case a tenant referred his contract to a tribunal, being unaware that the rent had previously been determined by the tribunal and registered.

He alleged no change of circumstances, but the landlord, in reply, set out increases of certain outgoings. The tribunal went into the whole case and *reduced* the rent. They took the view that the change of circumstances alleged by the landlord gave them jurisdiction to reconsider the whole case and enabled them lawfully to reduce the rent. For the reasons given above, the court quashed the decision on certiorari.
(Rent Restrictions Guide, 3rd ed., p. 121; Megarry, 6th ed., p. 365.)

R. v. *Agricultural Land Tribunal for the Wales and Monmouth Area, ex p. Davies* [1953] 1 W.L.R. 722; [1953] 1 All E.R. 1182

Agricultural holding—notice to quit—section 25 of Agricultural Holdings Act, 1948—discretion of Agricultural Land Tribunal.—This case illustrates the beneficial nature of the corrective jurisdiction of the High Court, through the instrumentality of certiorari, in restraining the excesses of inferior tribunals from whose decisions Parliament, in its wisdom, has provided no right of appeal. The Wales and Monmouth Agricultural Land Tribunal had got into a proper muddle in interpreting section 25 (1) of the Agricultural Holdings Act, 1948. Section 25 (1) lays down five grounds on which the Minister (or the Tribunal on appeal) may give consent to a notice to quit an agricultural holding. The Minister (and the Tribunal) is not bound to give consent, however, even if one of these grounds exists. The existence of a ground gives him a *discretion* to consent, but he may still withhold consent. If, however, none of these five grounds exist, he *cannot* give consent. In the above case the Tribunal purported to give consent under section 25 (1) (a) (interests of efficient farming), although it was not suggested that the tenant was farming his holding inefficiently. The ground on which the Tribunal acted was that if the landlord got possession of the holding it would assist him in farming more efficiently another holding belonging to the landlord, with which the tenant had nothing to do. The court pointed out that the interests of efficient farming referred to the farming of the holding to which the notice to quit related, and not to any other holding. There was, therefore, no ground on which the Tribunal could exercise its discretion in favour of the landlord, and the Tribunal's decision was quashed.

Corsini v. *Montague Burton, Ltd.* [1953] 2 W.L.R. 1093; [1953] 2 All E.R. 8

Landlord and Tenant Act, 1927—application for new lease—five-year period—must be occupation as tenants—period of occupation as licensees does not count.—In this case the plaintiffs claimed a new lease under the Landlord and Tenant Act, 1927. They and their predecessors in title had between them carried on business on the premises for more than five years, but, unfortunately, during part of the time that the predecessors in title had been in occupation they had been licensees only and not tenants. Later they obtained a tenancy, which

they subsequently assigned to the plaintiffs. The combined period of occupation of the plaintiffs and their predecessors *as tenants* was less than five years. The Court of Appeal, affirming the county court judge, held that the plaintiffs' claim failed. The qualifying period is a period during which the applicants, or the applicants and their predecessors in title, carried on business on the premises as tenants thereof. This case, like that of *Pasmore* v. *Whitbread & Co., Ltd.* [1953] 2 W.L.R. 359, assists to define the conditions of a successful claim under the 1927 Act. Like *Pasmore's Case* it appears to be sound in law. The 1927 Act provisions for compensation for goodwill and for the grant of a new lease are, however, defective as a whole, and there is little doubt that, whatever Government is in power, these provisions will be substantially amended.

(Woodfall, 24th ed., pp. 1075 *et seq.*)

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7. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

Profits Tax

Chappie, Ltd. v. *C. I. R.*, 32 A.T.C. 44; [1953] T.R. 69 (C.A.).

Statutory provisions: Sections 35 and 36 (1) (c), the Finance Act, 1947.

Point: A loan made to a member, although repayable upon commercial terms as to interest and security is nevertheless a "benefit" within subsection (1) of section 36, *supra*, and, it follows, a distribution.

Facts and Decision: At all material times the taxpayer was a United Kingdom corporation and was director controlled. The taxpayer caused a company to be incorporated in Eire, known as Chappie (Ireland), Ltd., to carry on a branch of its business in that country; at the material time the Irish company held shares in the English corporation.

The transaction giving rise to appeal was the advance on loan by the English company to Chappie (Ireland), Ltd., of the sum of £35,000, made upon the security of thirty-five debentures of £1,000, each carrying interest at the rate of 5 per cent. per annum. It was found as a fact, by the Special Commissioners, that this transaction was a commercial transaction in all respects.

The Revenue raised assessment on the taxpayer in the view that the loan of £35,000 was a distribution to members for profits tax purposes and hence a relevant distribution.

The Special Commissioners decided that a loan made in these circumstances was not a distribution within section 36; this decision was reversed by Danckwerts J. on appeal.

Held: affirming the judgment of Danckwerts J., that the loan was an amount applied for the benefit of the Irish company within the meaning of section 36 (1) (c), *supra*.

Leave to appeal to the House of Lords granted.

C. I. R. v. *Universal Grinding Wheel Co., Ltd.* [1953] 2 All E.R. 133; [1953] 3 W.L.R. 29 (Ch.D.).

Statutory provisions: Section 36 (1), the Finance Act, 1947.

Point: The words of the proviso to section 36 (1), *supra*, raise, as an issue of fact, the question as to what was the precise amount expended in reducing share capital, and this amount is not necessarily the nominal amount by which the capital was reduced.

Facts and Decision: The taxpayer company was incorporated with a nominal capital of £600,000 divided into 400,000 5 per cent. cumulative preference shares of £1 each and 400,000 ordinary shares of 10s. each. By article 8 of the articles of association provision was made for the redemption of the preference shares at a price equal to the nominal amount of each share, plus a premium of 7s. per share. In 1947 the taxpayer company redeemed its preference shares at a price of 27s. per share, and this was effected in part by an issue of new capital and in part out of profits available for dividend.

It was admitted that the distribution of 27s. per share was a distribution for profits tax purposes as defined by section 36 (1) of the Finance Act, 1947, but it was said to be exempted by force of the proviso to that subsection.

In these circumstances the Crown contended that the section, upon its true construction, referred to the amount applied, not in redeeming shares but in reducing capital, and consequently that a greater sum could not be applied in reducing capital than the nominal amount by which the capital was reduced in the balance sheet. Upon this basis there was a distribution of an amount equivalent to the premium of 7s. per share paid in accordance with the provisions of article 8 (1), *supra*.

The taxpayer company contended that the redemption of shares was, in contemplation of law, a purchase of shares by the company and further, that a company which purchases its own shares thereby reduces its capital. In fact, therefore, the sum of 27s. had, and had necessarily, been applied in reducing capital.

Held: (affirming the decision of the Special Commissioners) that the sum of 27s. was applied in reducing share capital and there was, therefore, no distribution within section 36 (1) of the Finance Act, 1947.

THE LIBRARY

The Law Relating to Wills with Precedents of Particular Clauses and Complete Wills. By W. J. Williams, B.A., Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1952. 2 vols. 1038 and 351 pp. (£7 7s.)

Vol. 1. *Law of Wills*

A completely new textbook on the complex subject of wills requires and deserves a more detailed review than usual. Mr. Williams's book, as might be expected, is an admirable and sound exposition of the law on the subject. The immense bulk of case law is deftly handled, material is attributed to text and footnotes with excellent judgment, and the parenthetic references to the clauses litigated in particular cases is most helpful. The print of the footnotes is rather small and there may be two opinions about placing the index and tables of statutes and cases to this volume in the second volume. The book gives reasons for even the most artificial rules of construction. Not only is the general law of wills dealt with, but also equitable doctrines having their main application in the case of wills, and many relevant portions of equity and the law of property. There seem to be no real inaccuracies in the text but a few criticisms may be made under two headings: passages needing some further clarification for ideal understanding, and suggestions for additional cross-references.

Further Clarification. Position of a contract as reducing net assets available for Family Provision (pp. 4, 622); saving of gifts to attesting witnesses (pp. 37 (r), 109 (o)); possibility of infant soldier disposing of entails (pp. 24, 72); cases on effect of will signed on page other than the last (pp. 53 (h), 54 (i), 55 (r)); clauses forbidding the appointment of the Public Trustee (pp. 113 (n), (o), 114 (s)); more discussion of the notion that all devises are specific in light of decisions under the Administration of Estates Act, 1925, s. 34 (pp. 148 (n.), 149 (x)); *Minister of Health* v. *Simpson* [1951] A.C. 251, not a creditors' action (p. 175 (c)); whether an assent is needed to protect a purchaser from a legatee (p. 175 (n)); lapse and special powers (pp. 232 (d), 230 (f)); class gifts, (p. 237 (i)); effect of conditions *in terrorem* (pp. 261 (r), 260 (h), 250 ff); contract to exercise void in the case of special power only (pp. 324 (f), 4 (a) and (b)); syncopation of text at p. 381 (l); effect of the Law of Property Act, 1925, s. 175 (p. 436 (o)) and consider *Re Bird* [1927] 1 Ch. 210 on the question of income of class gifts of real estate; words of limitation of entails depend on law of deeds—treatment is not very helpful at p. 501 (r), better at pp. 595 (h), 596 (b), but *quaere* as to general propositions and present position of implied cross-remainders; effect of accumulation violating perpetuity period under the Law of Property Act, 1925, s. 164—illustrations would help, *e.g.*, is accumulation directed for 22 years entirely void? (pp. 560 (h)); question of intention that equitable assignment operate as an assignment (p. 581 (b)).

Cross References. There is good cross-referencing backwards, as the text was built up. Forward cross-referencing should be added in future editions in many cases, *e.g.*, separate wills for assets in separate countries (pp. 7 (b) and 80 (f)); vesting of real estate in personal representative between 1898 and 1926 (pp. 7, 120); effect of striking out clause with pen (pp. 82 (c) and 97 (h)); dependent relative revocation (pp. 86 (top), 100 (i), 101 (p)); wills conditional on false assumption of fact (wide statement on p. 90 (t), limited by pp. 100 (d)

and 101 (d)); conditions *in terrorem* (pp. 244 (k) and 250 ff); proviso against alienation (pp. 245 (y) and 246 (k)); testator's consent to breach of condition against marriage (pp. 252 (g) and 260 (6)).

A. K. R. K.

Vol. 2. *Precedents*

The volume of precedents contains no fewer than 398 individual clauses in addition to 64 forms of complete wills. The arrangement is clear and coherent, the footnotes short and to the point and the general appearance pleasing. In general the author has borne in mind that conditions today are very different from those obtaining before the war and has provided precedents for wide investment (p. 793), for investment by way of purchase of a residence (p. 797): see *Re Power* [1947] Ch. 572, enabling capital to be raised for the benefit of a life tenant (p. 808) and enabling a business to be turned into a limited company (p. 733). It is rather surprising therefore to find no general *commorientes* clause. A weakness, which seems common to most precedent books, is that sufficient attention does not appear to be given to the incidence of taxation. Thus, the precedents for the will of a man in favour of his wife and children (pp. 882 and 891) cannot be regarded as satisfactory. The residue is given to the wife for life and then the children in equal shares. Small annuities to the children during infancy would ease the burden of income tax on the wife and a general power to raise capital would, if exercised judiciously, avoid the effect of *Cunard's Trustees* v. *I. R. C.* [1946] 1 All E.R. 159 (where it was held that, if an annuitant has her income made up out of capital, income tax in respect of the capital raised is attracted). A precedent is given (p. 744) to prevent a pecuniary legatee being saddled (no doubt, contrary to the testator's wishes) with estate duty as a result of the residue including realty (see *Re Owers* [1941] Ch. 17), but the question of foreign death duties, which has recently been considered in *Re Cunliffe-Owen* [1951] Ch. 964 and *Re Goetze* [1953] 2 W.L.R. 26, has not been properly dealt with. This cannot be considered as too unusual to warrant attention, for many testators hold some American, Canadian or South African securities.

E. F. G.

We have also received:—

Conveyancing Costs. Second edition. By J. L. R. Robinson. Oyez Practice Notes. London: The Solicitor's Law Stationery Society. 95 pp. (7s. 6d.) This edition, which has appeared remarkably promptly, in addition to setting forth all the relevant orders and scales and scales relating to costs in non-contentious business, contains 51 pages of comment. The new Schedule II method of charging renders a good deal of costing work unnecessary and the author's suggestions on the subject deserve attention. This is undoubtedly a very useful booklet.

The Law of Agency. By Raphael Powell, M.A., B.C.L., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1952. xliv and 339 and (index) 15 pp. (£2). The law of agency is singularly neglected by textbook writers and this book will help to fill the gap. Although the position of special kinds of agents such as auctioneers, estate agents and solicitors has not been overlooked we think it would have improved the book's usefulness if there had been separate sections dealing with them. It is rather surprising to find that such cases as *Suwerkrop* v. *Day* (1858) 8 A. & E. 624; *Dewar* v. *Mintoft* [1912] 2 K.B. 373; *Chaney* v. *Maclow* [1929] 1 Ch. 461 and *Phillips* v. *Butler* [1945] Ch. 358 are not apparently noted, particularly having regard to the substantial amount of authority in fact cited.